Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1406

CITY OF LOS ANGELES, a municipal corporation,

Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

BURT PINES,
City Attorney,

LAWRENCE M. NAGIN,
Senior Assistant City Attorney,

JOHN M. WERLICH,
Assistant City Attorney,

1 World Way,
Los Angeles, Calif. 90009,
(213) 646-3260,

Attorneys for Petitioner,
City of Los Angeles.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioner, City of Los Angeles, a municipal corporation, respectfully prays that a Writ of Certiorari issue to the Supreme Court of the State of California, to review that Court's decision holding that the City of Los Angeles, as the airport proprietor of Los Angeles International Airport, must respond in nuisance damages as a result of noise emanating from aircraft in flight utilizing its airport facilities.

Opinions Below.

The opinion of the Supreme Court of the State of California, 26 Cal.3d 86 (1979), is set forth in Appendix A, hereto.[1]

[1]Hereinafter the decision will be referred to as *Greater Westchester*.

The opinion of the Court of Appeal of the State of California, Second Appellate District, 89 Cal.App.3d 954 (1979), appears in Appendix B. The Trial Court's Memorandum Opinion, dated September 30, 1975, while not reported in any official California Reports, is set forth in Appendix C.

Jurisdiction.

The decision of the California Supreme Court to be reviewed was entered on December 14, 1979; this Petition for Certiorari was filed less than ninety (90) days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

This Court's review by certiorari is sought on the ground that the California Supreme Court has determined novel and substantial questions arising under the United States Constitution involving the application of this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), in a manner directly contrary to a decision of the United States Court of Appeals in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975).

Questions Presented.

1. Does the Federal Aviation Act of 1958, as amended, and implemented by the Federal Aviation Administration (FAA) and the Environmental Protection Agency (EPA) preempt the State of California from exercising its police power to impose nuisance liability on an airport proprietor for noise created by aircraft in interstate flight?

2. Is the California Supreme Court opinion in *Greater Westchester* contrary to the United States Supreme Court holding in *City of Burbank v. Lockheed Air Terminal, Inc.*, which holds that the FAA has full

control over aircraft noise, thereby preempting state and local control, and *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), which holds that an obligation to pay an award of damages is a form of regulation?

3. Will the award of nuisance damages compel airport proprietors to adopt noise abatement rules and regulations which will conflict with congressional intent to establish a uniform national policy to control aircraft noise, thus creating an undue burden on interstate commerce?

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Article I, Section 8, Clause 3:

> "The Congress shall have power to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States, Article VI, Paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

The Federal Aviation Act of 1958, 49 U.S.C. §1301 *et seq.* (*see* Appendix D).

Airport and Airways Development Act of 1970, 49 U.S.C. §1701 *et seq.* (*see* Appendix E).

Noise Control Act of 1972, PL 92-574 (*see* Appendix F).

Statement of the Case.

Petitioner owns and operates Los Angeles International Airport (LAX), the third busiest, publicly owned commercial airport in the world. LAX serves approximately 35 million passengers a year and accommodates every major domestic trunk air carrier in the United States, as well as numerous foreign flag carriers.[2] It serves the residents of all of southern California and has a major impact on interstate commerce as well as the economy of the entire region. Each of the commercial airlines and/or their aircraft operating into and out of LAX has been issued:

> (1) a certificate of public convenience and necessity by the Civil Aeronautics Board (CAB), specifying that said airline is authorized to conduct operations into and out of LAX;
>
> (2) an air carrier operating certificate from the Administrator of Civil Aeronautics (now Administrator of the FAA) specifying that said airline is properly and adequately equipped and able to conduct a safe operation as an air carrier of persons and/or property and mail and scheduled air transportation; and
>
> (3) an air worthiness certificate from the Administrator of the FAA approving its use in certificated operations.

From the time the aircraft utilizing the facilities at LAX leave their designated gate positions, they are under the *exclusive control* of the FAA. The pervasive nature of this type of control was succinctly

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[2]For the fiscal year 1978-79, LAX handled 548,475 aircraft operations, which transported 127,286 tons of mail, 775,860 tons of airfreight/express and 34,606,964 passengers.

stated by Mr. Justice Jackson, concurring in *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 303 (1943):

> "Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal command. At the moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of [federal controls]."

In 1969, persons residing in the vicinity of LAX instituted a lawsuit against Petitioner sounding in inverse condemnation and nuisance. In accordance with the principles enunciated in *Griggs v. Allegheny County,* 369 U.S. 84 (1962), the property owners were compensated for the "taking" of their property as a result of the aircraft noise.[3] In exchange, Petitioners were awarded air easements. The inverse condemnation portion of the lawsuit is not in dispute.

Following the award of inverse condemnation damages to the property owners, forty-one residents[4] were awarded the aggregate sum of $86,000 as nuisance damages caused by aircraft utilizing the facilities of LAX during the period 1967-75. The trial court based its award on California Civil Code §3479.[5] None

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[3]The date of "taking" for the inverse condemnation aspect of this case was established as June 24, 1967.

[4]Some of those awarded nuisance damages were not property owners; however, all those awarded nuisance damages were occupants in the single family residences which were the subject of the inverse condemnation action.

[5]Civil Code §3479 provides: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance."

of those awarded damages were actually physically injured from the effects of aircraft noise.[6]

Prior Raising of Federal Issues.

Petitioner has raised the applicability of federal questions at each stage of the litigation: Los Angeles County Superior Court, California Court of Appeal and the Supreme Court of California. The questions were raised as follows:

1. Los Angeles County Superior Court (Trial Court)
   - First Amended Answer to First Amended Complaint filed October 17, 1969, eighth affirmative defense.
   - Pretrial Conference Order filed January 24, 1975, Items 40, 41, 44, and 45 of Section a.
   - Defendants' Opening Trial Brief. Topic I, filed December 5, 1974.
   - The Trial Court disposed of these matters as follows:

     Memorandum Opinion filed September 30, 1975 (Appendix C) which concluded "that the noise from jet aircraft using the north runways constitutes a nuisance."

2. California Court of Appeal, Second Appellate District
   - Appellant's Opening Brief (*see* Appendix B for disposition).
3. California Supreme Court
   - Petition for Hearing filed April 6, 1979 (*see* Appendix A for disposition).

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[6]See Trial Court's Memorandum Opinion (Appendix C).

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. Introduction.

In 1973, after reviewing the provisions of the Federal Aviation Act of 1958,[7] the Noise Control Act of 1972,[8] and the regulations enacted pursuant to it,[9] this Court speaking through Justice Douglas stated in *City of Burbank v. Lockheed Air Terminal, Inc.*:

> "That act [The Noise Control Act of 1972] reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, *preempting state and local control.*" 411 U.S. at 638. (emphasis added).

Justice Douglas continued by stating that while the:

> "[C]ontrol of noise is of course deep seated in the police powers of the states. . . . The pervasive control vested in the EPA and in the FAA under the 1972 Act seems to us to leave no room for local curfews *or other local controls.*" *Id.* at 638. (emphasis added).

The Court did not set forth "the ultimate remedy for the aircraft noise which plagues many communities and *tens of thousands of people* . . . ." *Id.* at 638. (emphasis added). However, the Court hinted that the remedy might be found in the procedures adopted in accordance with the Noise Control Act of 1972. These procedures involve the implementation of various rules and regulations relating to the control of aircraft noise. The Court noted that the Administrator of the FAA had already imposed regulations

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[7] 72 STAT 731, 49 U.S.C. §1301 *et seq.*

[8] 86 STAT 1234; P.L. 92-574.

[9] 14 C.F.R., Parts 71, 73, 75, 77, 91, 93, 95 and 97.

relating to takeoff and landing procedures, runway preferences, and noise standards which aircraft must meet as a condition to type certification. Finally, the Court emphasized that "[a]ny regulations adopted by the Administrator [of the FAA] to control noise pollution must be consistent with the 'highest degree of safety'." The interdependence of these factors the *Burbank* Court concluded ". . . requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." 411 U.S. at 638, 639.

2. The Federal Aviation Act of 1958, as Amended and Implemented by the FAA and the EPA, and as Interpreted by the Burbank Court, Preempts the State of California From Exercising Its Police Power to Impose Nuisance Liability on an Airport Proprietor for Noise Created by Aircraft in Flight.

The rationale of the *Burbank* decision is that the delicate balance between aircraft safety and efficiency mandated by the Federal Aviation Act requires a uniform and exclusive system of federal regulation. The *Burbank* decision suggests that the ultimate remedy for noise impacted communities, while not known, lies with the procedures to be adopted under the Noise Control Act of 1972. Nowhere in the *Burbank* decision did the Court suggest that in addition to being responsible for inverse condemnation damages, the airport proprietor, who does not control aircraft in flight, should also be responsible for nuisance damages suffered by the residents from noise emanating from federally regulated aircraft.

The *Burbank* decision holds that the Federal Aviation Act of 1958 preempts, and thus prevents a non-airport proprietor from regulating or controlling aircraft in

flight. Under the circumstances, the enforcement of California's nuisance laws on an airport proprietor is a mere guise to effect indirect "regulation" of aircraft by a non-airport proprietor. This Court's decision in *San Diego Building Trades Council v. Garmon,* and the United States Court of Appeals decision in *Luedtke v. County of Milwaukee,* support the conclusions that (1) the obligation imposed by *Greater Westchester* to pay an award of nuisance damages is a form of regulation; and (2) a state's nuisance statute cannot be invoked to make flights unlawful which are in accordance with federal laws and regulations. Accordingly, these decisions compel a finding that the *Greater Westchester* decision is indeed contrary to the Supreme Court's decision in *Burbank.*

In *Garmon,* the Supreme Court, speaking through Justice Frankfurter, held that because it was arguable that certain union activities involved in that case fell within the ambit of the "concerted activities" or the "unfair labor practice" provisions of the National Labor Relations Act, state jurisdiction to award tort damages was preempted. Concerning this issue, Justice Frankfurter wrote:

> "Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from State regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, and it is designed to be, a potent method of governing conduct and con-

trolling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive Federal regulatory scheme. (Citations). It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of Federal authority. The same may be true of the incidents of a particular State injunction. To sanction either involves a conflict with federal policy in that it involves allowing two lawmaking sources to govern." 359 U.S. at 246, 247.

In *Luedtke,* the United States Court of Appeals for the Seventh Circuit affirmed the District Court which had refused to permit residents who were aggrieved by aircraft noise from seeking, among other things, nuisance damages under Wisconsin State law. The Court of Appeals in *Luedtke* addressed the precise issues now before this Court:

> "Since the federal laws and regulations have preempted local control of aircraft flights, *Burbank, supra,* the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, §114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. If, as the plaintiffs allege, the aircraft flights have resulted in the 'taking' of their property, the plaintiffs have actions at law to recover just compensation from the County. *Griggs, supra* . . . . To the extent that the County may be violating the

> federal laws or regulations, the plaintiffs should . . . exhaust their administrative remedies." 521 F.2d at 391, 392.

In summary, the merging of the concepts of *Burbank, Garmon* and *Luedtke* forge a rule which holds that a cause of action for nuisance damages against an airport proprietor cannot be maintained without evidence of a violation of a federal law or regulation, and then only after the claimant has exhausted all available administrative remedies.[10]

On the other hand, the California Supreme Court in *Greater Westchester* opined that the remedy at California airports is to assess nuisance damages against the airport proprietor.[11] However, the harmonizing of the delicate balance between the "highest degree of safety" and the *effective* control of aircraft noise, with which the Burbank Court was concerned, properly rests with those federal agencies that control aircraft

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[10]This in no way impacts the right of property owners to bring inverse condemnation actions as permitted in *Griggs*. In addition, the damages imposed upon airport proprietors in *Griggs* were constitutionally compelled, while those imposed by *Greater Westchester* were not constitutionally compelled, but rather an intrusion into a field preempted by Congress.

[11]The California Supreme Court tried to distinguish *Garmon* by stating that in that case a remedy existed within the National Labor Relations Act through the adjudication process of the National Labor Relations Board. *Greater Westchester* fails to recognize that the CAB, FAA and EPA offer an adequate remedy as suggested in *Luedtke:* "The regulations of the FAA provide that '[a]ny person who knows of a violation of the Federal Aviation Act of 1958, or of any regulation or order issued under it, may report it to the appropriate personnel of an FAA regional or district office,' and that each such report 'is investigated by FAA personnel.' The results of the investigation are the basis for determining the enforcement action that the FAA will take.' 14 C.F.R. § 13.1. The plaintiffs have failed to indicate why, if the County is violating provisions of the Federal Aviation Act or any regulations issued thereunder, adequate relief is not available through the FAA." 521 F.2d at 391.

flight, certification and scheduling. State legislatures and courts should not, and airport proprietors do not control these areas. Only the FAA, CAB, and Congress working together with nationwide interests in mind, are capable of ensuring a uniform, fair, economical and efficient nationwide aircraft noise abatement program.

3. If Airport Proprietors Are Held Responsible for the Award of Nuisance Damages, They Will Be Forced to Adopt Noise Abatement Rules and Regulations Which Will Conflict With Congressional Intent to Establish a Uniform National Policy to Control Aircraft Noise.

The Court in *Greater Westchester* failed to even discuss the principles enunciated in *Luedtke*.[12] Rather, the Court ignored these principles and took the position that while federal authorities may have encouraged the location and expansion of LAX, the ultimate decisions in this regard were made by the City and, therefore, the City would have to bear the untold cost of paying repetitive nuisance damage awards. The Court then, in effect, proposed three alleged solutions to reduce the impact of having to pay repetitive nuisance awards. None of these are practical remedies:

(1) California Supreme Court's First Proposal—Pursuant to State Law, the City Could Acquire Through Condemnation Proceedings All Noise Impacted Property.

While the condemnation of all residential property impacted by noise from aircraft in flight would reduce noise to the residents (after all they would no longer be living there), there is no evidence to indicate that such a "solution" would be economically feasible. For

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[12]Interestingly, a decision of the California Court of Appeal, *San Diego Unified Port Dist. v. Superior Court*, 67 Cal.App.3d 361 (1977) is in accord with *Luedtke*. By implication, this decision was overruled by *Greater Westchester*.

example, as stated by the FAA, approximately six million people currently reside on 900,000 acres of land exposed to levels of aircraft noise that create a significant annoyance for most residents, and 600,000 people reside within areas that are severely impacted by aircraft noise.[13] If the expenditure of vast sums by airport proprietors were the solution to the nationwide noise problem,[14] there would have been little need for Congress and the FAA to have attempted to resolve the noise problem through retrofitting and other noise abatement legislation and regulation.[15]

(2) California Supreme Court's Second Proposal—the City Could Acquire Air Easements.

While the *Greater Westchester* Court suggests that the acquisition of air easements is a remedy, in reality it is not because, as in the instant case, the acquisition of air easements does not and/or would not insulate the City from nuisance liability. Those persons who were awarded nuisance damages in the *Greater Westchester* case recovered them only *after* they (or the owners of the property in which they resided) were awarded inverse condemnation damages in exchange for air easements.

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[13]FAA, Department of Transportation, Aviation Noise Abatement Policy (November 18, 1976) p. 17.

[14]"The absence of lawsuits in some impacted areas and the recent occurrence of the most significant court precedents cause some observers to consider the pending suits to be merely the 'tip of the iceberg' with substantial potential liabilities yet to arise." FAA, Noise Abatement Policy, *supra,* p. 18.

[15]Indeed, Congress has enacted further legislation to address the aircraft noise problem in H.R. 2440, 96th Cong., 1st Sess. 1979, the "Aviation Safety and Noise Abatement Act of 1979". This Act is awaiting action by the President.

(3) California Supreme Court's Third Proposal—the City Has the Power to "Institute Reasonable Noise Abatement Procedures Which Do Not Conflict With Federal Law."

This solution will cause confusion and adversely impact the national transportation system. If the *Greater Westchester* decision stands, the City and other airport proprietors will be compelled, out of economic necessity, to take steps to minimize environmental impacts and liability exposure by implementing rules and regulations that could be inimical to a national uniform noise policy. Petitioner is not unmindful of the progeny of *Burbank,* which recognize the power of an airport proprietor to impose reasonable and nondiscriminatory airport use restrictions which do not create a burden on interstate commerce.[16] To this end, Petitioner has instituted, after consultation with the FAA as suggested in the Aviation Noise Abatement Policy,[17] a number of noise abatement procedures. However, these noise abatement procedures were not promulgated from a litigation posture with the primary intent of limiting liability. They were drafted in coordination with the FAA with a view towards maintaining "the highest degree of safety" and limiting adverse environmental impacts.

By their very nature, local airport proprietors, while attempting to minimize nuisance liability, would be forced to bow to parochial rather than the more important national interests. Indeed, the *Burbank* Court was appropriately concerned with the possibility of these

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[16]However, no federal decision has actually sanctioned a specific use restriction when contested at a commercial airport. See *British Airways Board v. Port Authority of New York, etc.,* 564 F.2d 1002 (1977); and *British Airways Board v. Port Authority of New York,* 588 F.2d 75 (1977).

[17]FAA, Aviation Noise Abatement Policy, *supra.*

parochial interests limiting the flexibility of the FAA. The Court stated:

> "If we were to uphold the *Burbank* ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. In 1960 the FAA rejected a proposed restriction on jet operations at Los Angeles airport between 10:00 p.m. and 7:00 a.m. because such restrictions could 'create critically serious problems to all air transportation patterns.' 25 Fed. Reg. 1764-1765." 411 U.S. at 639.[18]

Finally the trial court in *Greater Westchester* found the nuisance to be a continuing one and accordingly ruled that each aggrieved resident could periodically return to court with a new cause of action. The repetitive aspect of such suits is unlike the conclusive nature of an inverse condemnation action in which the airport proprietor receives an interest in the subject property, and litigation ceases. As a result of constant nuisance litigation, airport proprietors will be compelled to institute various alternative noise abatement programs at airports nationwide in an effort to protect themselves from repetitive and unlimited liability. As recognized in *Burbank,* the promulgation of locally crafted noise abatement programs will fractionalize and balkanize a uniform national transportation system,

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[18]There is no reason to believe that a multitude of curfews passed by airport proprietors would be any less burdensome on interstate commerce than a similar curfew imposed by a non-airport proprietor.

contrary to congressional intent. Even assuming an airport proprietor may overcome the monumental legal and technical problems involved in adopting noise abatement procedures that are neither arbitrary nor discriminatory, there is no guarantee that such a result will confer immunity from liability. Consequently, noise aggrieved parties can continue to claim nuisance damages and the viability of a uniform national transportation system will remain in the hands of local courts rather than the FAA.

Conclusion.

The *Greater Westchester* decision misinterprets the relevant case law and impermissibly extends *Griggs v. Allegheny County,* by holding that, in addition to inverse condemnation liability, airport proprietors will now also be liable under State tort law (in this case, "nuisance") for any personal harm or "emotional distress" caused by the operation of aircraft in flight and suffered by persons residing in the vicinity of an airport.

The *Greater Westchester* opinion fails to address and understand the existing legal and institutional scheme of airport and aircraft noise regulation. The result of *Greater Westchester* is a decision which will frustrate the congressionally declared federal policy of a uniform regulatory scheme for airport noise control. It will permit trial courts, on an *ad hoc* basis, to intrude in a preempted area by using their power to award money damages to regulate airport operations for noise abatement purposes. In short, the courts will be regulating airports, airlines and the airline transportation system under the guise of awarding damages.

Burbank is a clear expression by this Court that in order to ensure a uniform approach, Congress has delegated to the FAA and other federal agencies the power to regulate the air transportation industry in order to solve the aircraft noise problem. Clearly, non-airport proprietors may not so regulate. The *Greater Westchester* decision ignores the rationale of *Burbank* and the principle of *Garmon* that the imposition of damages is a form of regulation. Moreover, *Greater Westchester* not only fails to follow but, in effect, ignores the United States Court of Appeals decision in *Luedtke*.

The precepts of *Burbank*, calling for a uniform and exclusive system of federal regulation, are best served by the approach taken in *Luedtke:* a state's nuisance statute cannot be used to make flights unlawful which are in accordance with federal laws and regulations. *Greater Westchester* exacerbates, rather than solves, the aircraft noise problem. It will foster diversity rather than uniformity and divisiveness rather than cooperation.

For the above-stated reasons, the City respectfully requests this Court to grant the requested Petition for Certiorari.

Respectfully submitted,

BURT PINES,
City Attorney,

LAWRENCE M. NAGIN,
Senior Assistant City Attorney,

JOHN M. WERLICH,
Assistant City Attorney,

Attorneys for Petitioner,
City of Los Angeles.

APPENDIX A.

Opinion.

Greater Westchester Homeowners Association et al., Plaintiffs and Respondents, v. City of Los Angeles, Defendant and Appellant. [L.A. No. 31105. Dec. 14, 1979.]

SUMMARY

In a nuisance action, the trial court entered judgment against a city and in favor of persons living near the city's large airport for damages for annoyance, inconvenience, discomfort, mental distress, and emotional distress, resulting from noise generated by the arrival and departure of jet aircraft. Plaintiffs were also awarded judgment in inverse condemnation for property damage. Their action had been consolidated with other suits for direct condemnation brought by the city against the owners of other nearby parcels of land. The court also entered a post-judgment order imposing prejudgment interest on all of the awards, both condemnation and nuisance, and assessing attorney fees against the city. (Superior Court of Los Angeles County, No. C 931989, Bernard S. Jefferson, Judge.)

On the city's appeal from the nuisance judgment and the postjudgment order, the Supreme Court affirmed the judgment but reversed the order insofar as it awarded prejudgment interest on the personal injury claims and attorney fees. The cause was remanded for a determination of what attorney fees could be awarded plaintiffs under the principles and limitations expressed in the opinion. The court held that the nuisance claims did not fail by reason of federal preemption of control of noise emitted by flying aircraft. In that connection, the court pointed out that both the federal courts and the Federal Aviation Agency

have refrained from imposing limitations on the rights and obligations of a proprietor-landlord to control aircraft noise levels by nondiscriminatory regulations, and it held that, since the city, not the federal government, chose the location of the airport and elected to expand the facility with knowledge of the residential character of the area, there was no reason in law or policy why the nuisance remedy provided by Civ. Code, § 3479, should not be applied to protect the persons of the owners or occupants of the affected property. The court further held that the city's liability was not precluded by the provision of Civ. Code, § 3482, that nothing done or maintained under the express authority of a statute can be deemed a nuisance, and the fact that the operation of noise generating aircraft is specifically sanctioned by state and federal law. It noted that statutes broadly authorizing or regulating airports and aircraft flights do not create a legislative sanction for their maintenance as a nuisance. Holding that prejudgment interest on the nuisance judgment was improper, the court pointed out that damages for mental and emotional injury are not readily subject to precise calculation and that retroactive interest on such damages adds uncertain conjecture to speculation. Redetermination of the attorney fee award was required, the court held, by reason of failure of the trial court to make the findings necessary for such an award in a direct condemnation proceeding and failure of the order to show whether the fees assessed were actually based on services rendered in establishing those theories of recovery in which the law permits the allowance of fees. (Opinion by Richardson, J., with Tobriner, Mosk, Clark, Manuel and Newman, J.J., concurring. Separate concurring opinion by Bird, C.J.)

COUNSEL

Burt Pines, City Attorney, Lawrence M. Nagin, James H. Pearson, Assistant City Attorneys, and Kern & Wooley for Defendant and Appellant.

George Agnost, City Attorney (San Francisco), Donald J. Garibaldi, David I. Kroopnick, Louis E. Goebel, Michael Scott Gatzke, Ruth R. Mijuskovic, Luce, Forward, Hamilton & Scripps, Richard K. Simon and Kadison, Pfaelzer, Woodard, Quinn & Rossi as Amici Curiae on behalf of Defendant and Appellant.

Fadem, Berger & Norton and Michael M. Berger for Plaintiffs and Respondents.

RICHARDSON, J.—Is a municipality which owns and operates an airport liable on a nuisance theory for personal injuries sustained by nearby residents and caused by noise from aircraft using the facility? We will conclude that it is. The resolution of this issue requires a careful weighing of two conflicting interests and policies. On the one hand, by ancient law, the owners and occupants of land are entitled to the peaceful use, possession, and enjoyment of their property. On the other, the general public has a strong interest in the transportation and related services furnished by commercial aviation. These two interests, the private and the public, are solidly founded in the common law and deeply rooted in established constitutional doctrine. When locked in confrontation, which interest prevails and under what circumstances?

We have looked at the problem before. (*Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582 [39 Cal.Rptr. 708, 394 P.2d 548].) We examine it again in reviewing a judgment entered in the Los Angeles Superior Court in 1976 following a 1975 trial

wherein plaintiffs, multiple homeowners and their families living in the Westchester area adjacent to Los Angeles International Airport (LAX), sought damages from the defendant, City of Los Angeles (City), which owns and operates LAX. The condition of nuisance giving rise to their claim of emotional and mental distress was the noise generated by the arrival and departure of jet aircraft at LAX, the nation's third largest commercial aviation facility.

In 1968 plaintiffs, as owners and occupants of home situated near LAX's two north runways, sued the City in inverse condemnation for property damage and, on a nuisance theory, for personal injuries allegedly caused by noise, smoke, and vibrations emanating from aircraft using LAX. Plaintiffs' action was consolidated with other suits for direct condemnation which were brought by City against the owners of other nearby parcels of land. Trial of the direct condemnation and nuisance actions was bifurcated, and substantial direct and inverse condemnation judgments in favor of plaintiffs were entered and fully satisfied.

The nuisance phase of the case, tried before the court, resulted in findings of fact to the effect that the noise created by jet aircraft using the two north runways of LAX "interfered with person-to-person conversation in the home, . . . [with] normal telephonic communication, with the ability to enjoy the use of the out-of-doors' portion of their property and . . . to hear and enjoy television programs; that such noise caused frequent arousal from sleep and, in some cases, interfered with the ability . . . of school age members of the families to study in their homes." On the basis of the foregoing findings the trial court concluded that plaintiffs had established the existence of an actionable

nuisance giving rise to damages for "annoyance, inconvenience, discomfort, mental distress, and emotional distress," and that a nuisance recovery was independent of plaintiffs' claim for diminution of their property values.

In the nuisance proceeding 41 plaintiffs were awarded damages in the aggregate sum of $86,000 for personal injuries sustained during the period 1967-1975. Thereafter, in a postjudgment order the trial court imposed prejudgment interest on all of the awards, both condemnation and nuisance, and also assessed $200,000 attorney's fees against City which appeals from both the nuisance judgments and the postjudgment order.

Either by way of stipulation or from undisputed evidence, the following significant facts were established: The federal government exercises exclusive control over aircraft "in flight," defined as all movement of the plane from departure to arrival gates; LAX operates in a residential zone under a 1955 conditional use permit from City; City initially located the two north runways with full knowledge that the noise from their use would reach nearby established residences; the north runways were constructed with substantial federal financial assistance under grant agreements between City and the Federal Aviation Administration (FAA); and all commercial aircraft using LAX have federal airworthiness certificates which indicate compliance with federal noise emission standards.

City has consistently argued that plaintiffs' nuisance claim must fail for two reasons. First, the noise in question originates from flying aircraft over which the United States government exercises exclusive dominion and therefore any attempted noise control by an airport

operator is federally preempted. Second, the operation of aircraft being expressly sanctioned by statutory law, any aircraft noise emissions cannot constitute a nuisance because of Civil Code section 3482, which provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." We review, and will reject, each of these contentions and will also consider several collateral questions raised by the trial court's postjudgment order.

Preemption

Certain fundamental principles expressed by the United States Supreme Court guide our analysis of the preemption issue. When respective federal and state sovereignties are juxtaposed, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " (*Merrill Lynch, Pierce, Fenner & Smith v. Ware* (1973) 414 U.S. 117, 127 [38 L.Ed.2d 348, 359, 94 S.Ct. 383].) The courts thereby attempt "the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce. . . ." (*Freeman v. Hewit* (1946) 329 U.S. 249, 253 [91 L.Ed. 265, 272, 67 S.Ct. 274].)

The United States Supreme Court has described, generally, the scope of the preemption doctrine. It has said that federal regulation of an area of commerce may preempt state actions upon the same subject matter if (1) there is an apparent congressional intent to blanket the field, (2) the federal and state schemes directly conflict, or (3) any state intervention would burden or frustrate the full purposes and objectives of Congress. (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 141 [10 L.Ed.2d 248, 256, 83 S.Ct. 1210]; *Rice v. Santa Fe Elevator Corp.* (1947) 331

U.S. 218, 230-231 [91 L.Ed. 1447, 1459-1460, 67 S.Ct. 1146].) The controlling inquiry on the preemption issue is determining whether the state action stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 57, 67 [85 L.Ed. 581, 586,-587, 61 S.Ct. 399].)

The preemptive intent of Congress may be explicit or implicit, but where the effect of preemption is to impede the exercise of historic state powers the high court has held that the intent must be "clear and manifest." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525 [51 L.Ed.2d 604, 614, 97 S.Ct. 1305], quoting *Rice, supra,* at p. 230 [91 L.Ed. at p. 1459].) Furthermore, preemption exists only to the extent necessary to serve congressional objectives. (*Merrill Lynch, Pierce, Fenner & Smith v. Ware, supra,* 414 U.S. at p. 127 [38 L.Ed.2d at p. 359].) Additionally, it has long been recognized that state action may also be precluded where it unreasonably affects or discriminates against interstate commerce, or touches upon a field of commerce which requires uniform national regulation. (U.S. Const., art. I, § 8, cl. 3; *A&P Tea Co. v. Cottrell* (1976) 424 U.S. 366, 370-372 [47 L.Ed.2d 55, 60-61, 98 S.Ct. 923]; *Freeman v. Hewit, supra,* 329 U.S. 249, 252 [91 L.Ed. 265, 278-279]; *Cooley v. Board of Wardens of Port of Philadelphia et al.* (1852) 53 U.S. (12 How.) 298, 339 [13 L.Ed. 996].)

Consistent with the foregoing general principles and with specific application to aviation, we have previously acknowledged that commercial flights which are conducted in strict compliance with federal regulations may not be enjoined as nuisances, both because of

the continuing public interest in air transportation, and because of the likelihood of direct conflict with federal law. (*Loma Portal Civic Club v. American Airlines, Inc., supra,* 61 Cal.2d 582, 591.) In so holding, however, we expressly cautioned that our decision did not determine the "rights of landowners who suffer from airplane annoyances to seek damages from the owners or operators of aircraft *or to seek compensation from the owner or operator of an airport.*" (*Ibid.,* italics added.) Preemption, we observed, did not operate per se to preclude the enforcement of private state remedies for aircraft noise damage, and only a "compelling federal interest" would support a finding that Congress intended to nullify state-created rights. (*Id.,* at p. 592.)

Is there a "compelling federal interest" which precludes state imposition of nuisance liability upon the proprietor of an airport? If so, it will be revealed in current statutory and decisional law which we examine.

The Federal Aviation Act of 1958, as amended (Act) (49 U.S.C.A. § 1301 et seq.; all statutory references are to 49 U.S.C.A. unless otherwise cited) grants the FAA exclusive control over aircraft takeoffs, landings, and air navigation. (§ 1348(c); see 14 C.F.R. pts. 1-171.) Acting through the FAA, the federal government also provides construction grants for needed airports under agreements which require extensive federal supervision of their location, layout, design, and environmental compatibility. (§§ 1716(c)-(e), 1718 (a)(3), (a)(4), 1719.) Section 1718(a)(1) requires that airports so subsidized must be available for public use on "fair and reasonable terms and without unjust discrimination, . . ." The federal government has also

been involved in aircraft noise control. Since 1968 the FAA and, more recently, the Environmental Protection Agency (EPA) have been under congressional mandate to establish maximum noise emission levels for operating aircraft (§ 1431(b)(1)); and preliminary federal noise control standards have been in effect since 1969 (14 C.F.R. § 36.1 et seq.).

Shortly after the adoption of the Act the Supreme Court majority in *Griggs v. Allegheny County* (1962) 369 U.S. 84 [7 L.Ed.2d 585, 82 S.Ct. 531], reaffirmed the obligation of a public entity to compensate, through the inverse condemnation remedy, for *property* "taken" when excessive airport noise prevents the peaceful use and occupancy of residential land. The rights of property owners in this situation were fully respected. (See also *Aaron v. City of Los Angeles* (1974) 40 Cal.App. 3d 471, 483-486 [115 Cal.Rptr. 162], *cert. den.* (1975) 419 U.S. 1122 [42 L.Ed.2d 822, 95 S.Ct. 806].)

Subsequently, however, when a preemption issue within the context of assertion of the local police power, the high court majority held that the Act, as amended by 1968 and 1972 federal noise control laws had completely preempted local regulation of "aircraft in flight" for the purpose of aviation noise abatement. (*City of Burbank v. Lockheed Air Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547, 93 S.Ct. 1854].) Interpreting the foregoing Act the high court, in invalidating an ordinance of the City of Burbank which imposed a night curfew on jet flights at the privately owned Hollywood-Burbank Airport, reasoned that the federal legislation demonstrated an implicit congressional intent to give to the FAA and EPA full control over aircraft flight and aviation noise.

The *Burbank* court concluded that the widespread imposition of local curfews would frustrate flight scheduling and navigational patterns nationwide, thus hindering commerce, aviation safety, and the general FAA management of the national air traffic network (pp. 637-640 [36 L.Ed. 2d pp. 555-557].)

While thus precluding local regulation of aircraft noise under the police power, the *Burbank* court expressly refrained from imposing similar limitations on the rights and obligations of a *proprietor-landlord* to control aircraft noise levels. The high tribunal carefully noted that congressional committees which were considering the 1968 and 1972 laws had affirmed the Department of Transportation/FAA view that federal law did not preempt the exercise of reasonable, non-discriminatory proprietary control over land use planning, design and location of runways, aircraft noise limits, and curfews. Specially referring to a letter from the Secretary of Transportation to a senate subcommittee which was considering the 1968 noise control legislation, the court said: "The letter from the Secretary of Transportation also expressed the view that 'the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport* [italics in original], from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* [italics in original] can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.' . . . [¶] [W]e are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. . . . Thus,

authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality *as a proprietor* [italics added]." (Pp. 635-636, fn. 14 [36 L.Ed.2d at p. 555]; see Sen.Rep. No. 1353, 90th Cong., 2d Ses. (1968), 1968 U.S. Code Cong. & Admin. News pp. 2688, 2693; cf. Sen.Rep. No. 92-1160 2d Sess. (1972), 1972 U.S. Code Cong. & Admin. News, pp. 4655, 4663.)

The careful distinction drawn by the Supreme Court between proprietary duties and police power regulation is supported administratively by the FAA, which both before and after *Burbank* has publicly emphasized the local airport operator's responsibilities for noise control. (E.g., FAA, Dept. of Transportation, Aviation Noise Abatement Policy (Nov. 1976) at pp. 5, 32-34; 14 C.F.R. §§ 36.9, 399.110(f); 34 Fed.Reg. 18355 (1969).)

In the wake of *Burbank,* however, there has been no appellate agreement on the scope of the so-called "proprietor exception" to the federal preemption rule and its effect on the tortious liability of airports. Some federal courts have held that the effect of *Burbank* is to bar airport proprietors from restricting the patterns, frequency, and scheduling of flights, and to prohibit any limitation on the permissible types of aircraft. (*Luedtke v. County of Milwaukee* (7th Cir. 1975) 521 F.2d 387, 390-391 [absolving proprietor of nuisance liability for airport noise]; *County of Cook v. Priester* (1974) 22 Ill.App.3d 964 [318 N.E.2d 327, 330-332].) Other courts, while agreeing that proprietors may not regulate *aircraft* have held that airport operators do retain responsibility for the proper construction, operation, and maintenance of ground facil-

ities, and for land use planning designed to minimize the effects of noise. (E.g., *Air Transport Association of America v. Crotti* (N.D.Cal. 1975) 389 F.Supp. 58, 63-64.)

Several federal courts, supporting the FAA position, have interpreted *Burbank* as recognizing the power of a proprietor to impose airport use restrictions to the extent that they are reasonable and nondiscriminatory. In two cases involving flights of the Concorde supersonic transport (SST) airplane the second circuit concluded that New York City's John F. Kennedy Airport may impose reasonable noise limitations, the effects of which might preclude the commencement of SST service. (*British Airways v. Port Authority of New York, Etc.* (2d Cir. 1977) 564 F.2d 1002, 1011; *British Airways Bd. v. Port Authority of New York* (2d Cir. 1977) 558 F.2d 75, 82-85.) A lower federal court has upheld the right of a noncommercial municipal airport to impose a *Burbank*-type curfew. (*National Aviation v. City of Hayward, Cal.* (N.D.Cal. 1976) 418 F.Supp. 417, 424-425.)

In *San Diego Unified Port Dist. v. Superior Court* (1977) 67 Cal.App.3d 361 [136 Cal.Rptr. 557] (cert. den. *sub. nom. Britt et al. v. San Diego Unified Port District et al.*, 434 U.S. 859 [54 L.Ed.2d 132, 98 S.Ct. 184]), the Court of Appeal, while concluding that federal regulation of aviation and aircraft noise preempted the proprietor's control of "aircraft in flight," nonetheless held that a proprietor could be responsible in tort for the noise consequences of its land use planning decisions and improper use and maintenance of its ground facilities (pp. 376-378).

As the *Burbank* court suggests, considering the inverse condemnation burden imposed upon airport own-

ers by *Griggs,* Congress apparently intended to preserve the principle of substantial proprietary control over airport planning, design, and use. (See Comment, *Aircraft Noise: Federal Pre-emption of Local Control, Concorde and Other Recent Cases* (1977) 43 J. Air L. & Com. 753, 777; see also, Airline Deregulation Act of 1978, Pub.L. No. 95-504, 49 U.S.C.A. §1305 (a)(1).) Nonetheless, the related congressional enactments contemplate very considerable federal involvement in the planning and operation of airports. The FAA has apparently invoked both contractual and regulatory authority on several occasions to oppose unilateral proprietor use restrictions. (See EPA, Legal and Institutional Analysis of Aircraft Noise and Apportionment of Authority Between Fed., State, and Local Governments (July 1973) at pp. 4/25-4/28.) Furthermore, the *Burbank* opinion strongly suggests that any local noise or use restrictions, by whomever imposed, which substantially upset current air schedules or prevented the use of commercial aircraft which were currently operational would burden to an unacceptable degree both federal aviation policy and interstate commerce. (See Note, *Aircraft Noise Abatement: Is There Room For Local Regulation?* (1975) 60 Cornell L. Rev. 269, 288-293; Note, *Shifting Aircraft Noise Liability to the Federal Government* (1975) 61 Va.L.Rev. 1299, 1333-1335.)

On the other hand, the citizen's rights to the full use, possession, and enjoyment of his property are given a protected status under the law. Since 1873 our statutes have defined an actionable nuisance as "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfort-

able enjoyment of life or property . . ." (Civ. Code, § 3479.) The foregoing authorities recognize that a property owner has an inverse condemnation remedy, constitutionally founded, against the proprietor of an airport for *property* damage or loss caused by noise generated at the facility. We discern no reason either in law or policy why the common law and statutory remedy of nuisance as above defined should not under similar circumstances equally protect the *person* of the owner or the occupant.

We find significance in the depth and continuous nature of City's involvement in the creation and maintenance of the nuisance in question. City concedes that it, and not the federal government, decided to build and then to expand the airport in the immediate vicinity of a residential area. It is undeniable that City chose the particular location and direction of the airport runways. It approved their usage by jet aircraft. It entered into service agreements with commercial air carriers all with full and prior knowledge of the potential noise impact. (See *City of Los Angeles v. Japan Air Lines Co., Ltd.* (1974) 41 Cal.App.3d 416, 419-422 [116 Cal.Rptr. 69].)

Admittedly, some of the foregoing actions by City followed federal advice, approval, and perhaps even encouragement. Nonetheless, City chose, and was not forced by anyone, to develop LAX in its particular location. City voluntarily elected to expand the facility, with foreknowledge of the preexisting nature and usage of the surrounding area. There is no evidence before us that City opposed the current level of federally approved jet service at LAX. Fair inferences are to the contrary. (*Id.*, at pp. 422-423.)

Nor has City lacked the means to meet the obligations herein imposed. Since at least 1965, public entities have had statutory power to condemn "aircraft noise . . . easements," and to secure, in appropriate quantities, land which might otherwise be the subject of noise damage actions. (Code Civ. Proc., § 1240.110, subd. (a) (former § 1239.3); see *City of Oakland v. Nutter* (1970) 13 Cal.App.3d 752, 772 [92 Cal. Rptr. 347].) This power and City's responsibility to exercise it in such a manner as to minimize noise at LAX have been publicly acknowledged by airport management. Aircraft landing fees have been established to assist in meeting the costs of land acquisition. (*Japan Air Lines, supra,* at p. 423.) With particular reference to the matter before us, plaintiff's acoustician testified at trial that as early as 1967 he had suggested to LAX officials the economic feasibility of constructing ground barriers to deflect and diminish LAX noise. The soundproofing of adjacent structures and restrictions on noise generated by static engine tests were additional proposed alternatives. Accordingly, City cannot fairly argue that federal law has rendered City powerless to prevent or reduce the damages of which plaintiffs complain.

Pointing to the depth of federal involvement in air navigation and noise abatement and by analogy with a series of United States Supreme Court holdings in the field of labor relations following *San Diego Unions v. Garmon* (1959) 359 U.S. 236 [3 L.Ed.2d 775, 79 S.Ct. 773], City and its amici urge preclusion of any state recognized tort liability for airport noise. In *Garmon,* state courts were held powerless to examine conduct which was either protected or prohibited by

the provisions of the National Labor Relations Act (NLRA). However, the *Garmon* principles have been held by the high court itself to be limited by the unique nature of the NLRA which empowers the National Labor Relations Board (NLRB) to devlop a uniform national labor policy affecting labor-management disputes within NLRA's scope. (*Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 194-198 [56 L.Ed.2d 209, 223-226, 98 S.Ct. 1745]; *Machinists v. Wisconsin Emp. Rel. Comm'n* (1976) 427 U.S. 132, 138-139 [49 L.Ed.2d 396, 402-403, 96 S.Ct. 2548]; *Garmon, supra,* at pp. 239-246 [3 L.Ed.2d at pp. 779-784].) Even in labor relations cases, however, *Garmon* has not been interpreted as precluding resolution by the state of disputes which the NRLB could not have resolved, or of disputes in which a state's significant interest in protecting its citizens outweighed federal labor considerations. (*Sears, supra,* at pp. 197-198 [56 L.Ed.2d at pp. 225-226]; *Farmer v. Carpenters* (1977) 430 U.S. 290, 298-301 [51 L.Ed.2d 338, 348-351, 97 S.Ct. 1056]; *Garmon, supra,* at pp. 243-244 [3 L.Ed.2d at pp. 781-783].)

Our examination of the Act reveals nothing to suggest that FAA possesses any adjudicatory power over noise disputes between airport owners or proprietors, and property owners or occupants. Nor do any federal aviation laws provide for relief to noise victims. On the contrary, the Act specifically provides that its terms shall not abridge "remedies now existing at common law or by statute, . . ." (§ 1506.) This would seem to preserve the validity of preexisting nuisance causes of action. Recognizing as we do the state's traditional interest in compensating its citizens for damages incurred, whether to person or property, and no reason

appearing for extending the *Garmon* doctrine to the airport noise situation, we decline to do so.

Finally, we are not persuaded that preemption is mandated because recognition of a state nuisance remedy would impermissibly hinder commerce or conflict with federal policy. We cannot assume that the imposition of liability on a proprietor for personal injury would burden commerce to an appreciably greater degree than that represented by the well accepted, indeed constitutionally compelled, exposure of the proprietor to property damage claims. While it is true that the probable number of claimants will increase and the nature of the claims enlarge, we discern no basis for any reasoned distinction between claims for property damage and personal injury arising from the same activity and cause.

We therefore hold that the claims for personal injuries founded upon nuisance have not been federally preempted.

Civil Code Section 3482

City contends that LAX cannot be liable for nuisance because the noise generating activity complained of is specifically sanctioned by statutes, federal and state, Particularly, City relies upon Civil Code section 3482.

We have consistently applied a narrow construction to section 3482 and to the principle therein embodied. Thus, a number of years ago we observed, " 'A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature

contemplated the doing of the very act which occasions the injury." (*Hassell v. San Francisco* (1938) 11 Cal. 2d 168, 171 [78 P.2d 1021], quoting 46 C.J., Nuisances, § 41, p. 674; see also *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43]; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 938, fn. 16 [101 Cal.Rptr. 568, 496 P.2d 480].)

As we recently confirmed in *Varjabedian,* "A requirement of 'express' authorization embodied in the statute itself insures that an unequivocal legislative intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that would result were every generally worded statute a source of undetermined immunity from nuisance liability." (P. 291.) In a similarly restricted fashion an appellate court has noted that "Accordingly, although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance." (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 129 [99 Cal.Rptr. 350].)

The planning, location, construction, and operation of airports and the specifications and flight procedures of the aircraft using them are closely regulated by both federal and state law. Both levels of government are pledged, generally, to foster the growth of civil aviation and, specifically, the development of needed air terminals. However, we observed in *Nestle v. City of Santa Monica, supra,* that statutes which broadly authorize or regulate airports and aircraft flights do not create a legislative sanction for their maintenance as a nuisance. (6 Cal.3d at p. 938, fn. 16.)

The argument is made that because aviation and noise are necessarily inseparable, governmental approval

and encouragement of aviation activity necessarily implies legislative approval of aviation noise which results in interference with neighboring land uses. We disagree. Both federal and state authorities have attempted vigorously to abate aircraft and airport noise. (Pub. Util. Code, §§ 21002, subd. (g), 21669-21669.5.) In addition, as previously noted, the California Legislature has granted airports express and expanded condemnation and compensation authority to reduce and minimize the effects of noise on the private use and enjoyment of neighboring land. (Code Civ. Proc., § 1240.110, *supra,* Pub. Util. Code, §§ 21690.5 et seq., 21690.20 et seq.) Reasonably construed, the foregoing legislation preserves both the authority and responsibility of an airport proprietor to acquire adequate noise easements and to institute reasonable noise abatement procedures which do not conflict with federal law.

City's reliance on *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 Cal.App.2d 599 [72 Cal.Rptr. 240], is unpersuasive. The *Lombardy* court held that section 3282 barred any nuisance recovery for damages incurred by reason of a vehicular freeway constructed under authority of the Streets and Highways Code (p. 605). While we did not reach the question of the continued validity of *Lombardy* in *Varjabedian, supra* (20 Cal.3d at pp. 291-292, fn. 6), we did reiterate that our *Hassell* test of legislative authorization required a "particularized" inquiry into each statute to ascertain whether there existed a legislative intent to sanction a nuisance. Considered in the airport noise context, the *Lombardy* analysis of the laws therein presented does not persuade us that the Legislature intended that immunity from traditional nuisance liability is statutorily conferred. To the contrary, we hold

that no such immunity derives from section 3482 or any other related federal or state statute.

Prejudgment Interest

City contends that the trial court improperly awarded prejudgment interest under Civil Code section 3288 for the personal injuries and emotional distress sustained by reason of the airport noise. We agree with the contention.

Section 3288 recites, "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." We have recently affirmed that, unlike Civil Code section 3287, which relates to liquidated and contractual claims, section 3288 permits discretionary prejudgment interest for unliquidated tort claims. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814-815 [148 Cal. Rptr. 22, 582 P.2d 109].) In *Bullis,* we characterized prejudgment interest as "awarded to compensate a party for the loss of his or her *property.*" (*Id.,* at p. 815, italics added; see also *Nordahl v. Department of Real Estate* (1975) 48 Cal.App.3d 657, 665 [121 Cal.Rptr. 794] ["deprived of the use of his money or property"].) The award of such interest represents the accretion of wealth which money or particular property could have produced during a period of loss. Using recognized and established techniques a fact finder can usually compute with fair accuracy the interest on a specific sum of money, or on property subject to specific valuation. Furthermore, the date of loss of the property is usually ascertainable, thus permitting an accurate interest computation. (*Bullis, supra,* at p. 815.)

However, damages for the intangible, noneconomic aspects of mental and emotional injury are of a different

nature. They are inherently non-pecuniary, unliquidated and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation. Moreover where, as here, the injury was of a continuing nature, it is particularly difficult to determine when any particular increment of intangible loss arose. Acknowledging the problem, the trial court arbitrarily resorted to an "averaging" method applied to both the amount and duration of the loss. In our view this process was impermissibly speculative.

Furthermore, a fact finder in assessing a claim of general damages for physical, mental and emotional suffering, possesses full authority to consider the duration of the alleged suffering. Accordingly, the disallowance of any interest on such a claim does not deprive the claimant of compensation for an element of actual damage. To the contrary, its allowance, in fact, may in a given case create a double recovery.

For the foregoing reasons, some respected commentators have disapproved the allowance of prejudgment interest on a claim of general damages for suffering. (E.g., McCormick, Damages (1935) § 57, p. 226; Comment, *Interest as Damages in California* (1958) 5 UCLA L.Rev. 262, 264, 271; see also Rest., Torts, § 913(2).) No California courts have previously extended section 3288 to general damages for personal injury, and the prevailing common law view in other jurisdictions appears to be that prejudgment interest is inappropriate in such cases. (See authorities collected in 22 Am.Jur.2d (1965) Damages, § 191, p. 269, fn. 8.) We conclude that the better rule disallows prejudgment interest on the nuisance claim.

Counsel Fees

The trial court awarded plaintiffs' counsel attorney's fees in the amount of $200,000. In making the award the court did not segregate the fees on the basis of any particular allocation to the direct condemnation, inverse condemnation and nuisance-personal injury phases of the suit. This is necessary. Attorney's fees may be granted in direct condemnation proceedings (Code Civ. Proc., §§ 1235.140, subd. (b) (former § 1255a, subd. (c)), 1268.710 (former § 1255)), but only when and if the trial court makes those statutory findings required by Code of Civil Procedure section 1250.410 (former § 1249.3). The trial court made no such findings. Attorney's fees are clearly recoverable and appropriate with respect to inverse condemnation. (*Id.*, § 1036 (former § 1246.3).) The parties agree that counsel fees may not be assessed with respect to the personal injury claim. (*Id.*, § 1021; *Davis v. Air Technical Industries, Inc.* (1978) 22 Cal.3d 1, 6 [148 Cal.Rptr. 419, 582 P.2d 1010].)

The trial court's award of counsel fees substantially discounted counsel's original claim of $352,000. We express no opinion as to the propriety of the amount of fees awarded by the trial court, leaving the determination to its sound discretion. We are unable to ascertain, however, whether the fees which were assessed were actually based upon services rendered to plaintiffs in establishing those theories of recovery in which the law permits the allowance of fees. We must accordingly remand the case for an appropriate allocation of attorney's fees, limiting their award to recovery under those causes of action which statutorily permit their assessment.

The judgment appealed from is affirmed. The order after judgment is reversed insofar as it awards (1) prejudgment interest on the personal injury claims, and (2) attorney's fees, and is otherwise affirmed. The cause is remanded to the trial court for further proceedings for the purpose of determining what attorney's fees should be awarded plaintiffs under the principles and limitations herein expressed. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 26(a).)

Tobriner, J., Mosk, J., Clark, J., Manuel, J., and Newman, J., concurred.

BIRD, C. J., Concurring.—I write separately since the majority's preemption analysis contains a significant flaw which may spawn unnecessary future litigation.

The majority opinion holds that a tort action may be brought against airport proprietors for personal injuries resulting from airport noise since federal law has not preempted this area. The fundamental weakness of the opinion is not its result but its reasoning. Although the opinion discusses congressional intent, the opinion ultimately supports its holding with a misplaced reliance on inverse condemnation law. (Maj. opn., *ante*, at p. 98.) In an inverse condemnation action, the property owner alleges that his constitutional rights were violated because his property was taken without just compensation. Preemption is *not* in issue since federal regulations cannot preempt constitutionally protected rights.

Any preemption analysis should place reliance upon, and not merely give lip service to, congressional intent. The determinative inquiry is whether either (1) the federal regulation is so extensive that it evidences a

congressional design to preempt the field or (2) there is actual conflict betwen the propsoed local action and the federal regulation such that the two schemes of regulation cannot both stand. (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 141 [10 L.Ed. 2d 248, 256, 83 S.Ct. 1210].)

The related congressional enactments contemplate considerable federal involvement in the construction, supervision and operation of jet aircraft and the airports which serve them. The Federal Aviation Act provides that, "[t]he United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. . . ." (49 U.S.C. § 1508(a).)[1] This act authorizes the administrator of the Federal Aviation Administration (FAA) to develop rules and procedures for the safe and efficient use of navigable airspace as well as the certification of aircraft, airmen, commercial air carriers and airports. (§§ 1348(c), 1371, 1429, 1430, 1432.) Under these statutes, the FAA is required to regulate the flight patterns of civil aircraft including the procedures and routes used in takeoff and landing. (14 C.F.R. pts. 1-171.)

There are specific provisions which relate to noise control. For example, the FAA, after consultation with the Environmental Protection Agency, is required to provide "for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter." (§ 1431(b)(1).) If federal subsidies are being received, the FAA

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[1]All statutory references are to title 49 of the United States Code, unless otherwise indicated.

may also exert control over the planning, design, location, construction, layout, environmental compatibility and intergovernmental coordination of airport projects. (§§ 1716(c)-(e), 1718(a)(3), 1718(a)(4), 1719.)

While federal regulation is extensive, both the legislative and executive branches have publicly emphasized local airport operators' responsibility for controlling airport noise through reasonable nondiscriminatory regulation. For example, the Senate Commece Committee Report which discussed the anticipated effects of the Federal Aviation Act, quoted with approval the following language of the Secretary of Transportation: "[t]he proposed legislation will not affect the rights of a state or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." (Sen. Rep. No. 1353, 90th Cong., 2d Sess.; 1968 U.S. Code Cong. & Admin. News, pp. 2688, 2694.)

Similarly, the House Interstate and Foreign Commerce Committee Report indicated that the Congress did not intend to preempt this area. "Rather, the committee expects manufacturers, air carriers, all other segments of the aviation community, the State and local civic and governmental entities to continue and increase their contributions toward the common goal of quiet." (H.R.Rep. No. 1463, 90th Cong., 2d Sess., p. 4.) In *British Airways Bd. v. Port Authority of New York* (2d Cir. 1977) 558 F.2d 75, 82, the United States Department of Justice filed an amicus brief in which it "denied that existing legislation

authorized the Executive under any circumstances to preempt airport proprietors from promulgating their own noise regulations." Finally, the FAA and the United States Department of Transportation, in a statement of Aviation Noise Abatement Policy, said: "Airport proprietors are primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area. Such actions include optimal site location, improvements in airport design, noise abatement ground procedures, land acquisition, and restrictions on airport use that do not unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce." (FAA, Dept. of Transportation, Aviation Noise Abatement Policy (Nov. 18, 1976) p. 5.) "Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake—and have considered carefully and rejected—full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments." (*Id.*, at p. 34.)

The Supreme Court recognized this limitation of federal control in *City of Burbank v. Lockheed Air Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547, 93 S.Ct. 1854]. A municipality acting under its *police power*, was held to have acted improperly in enacting nighttime jet curfews of flights emanating from or landing at a privately owned airport since this type of local regulation was held to be federally preempted.

The court reasoned that widespread imposition of local curfews could frustrate flight scheduling and navigational patterns nationwide, thus burdening interstate commerce, aviation safety, and the FAA's management of the air traffic network. (*Id.*, at pp. 639-640 [36 L.Ed.2d at pp. 556-557].) Nevertheless, the Supreme Court explicitly stated that their decision did not decide in any way the rights of airport operators, acting in their *proprietary* capacity, in regulating airport use to abate noise. (*Id.*, at p. 635, fn. 14 [36 L.Ed.2d at p. 555].)

Although post-*Burbank* judicial decisions have disagreed on the scope of the so-called "proprietor exception," those decisions make clear that not all proprietor regulations have been federally preempted. Several cases have recognized a proprietor's power to impose airport use restrictions where reasonable and nondiscriminatory. E.g., *British Airways Bd. v. Port Authority of New York* (2d Cir. 1977) 564 F.2d 1002, 1011; *British Airways Bd. v. Port Authority, supra,* 558 F.2d at pp. 82-85.) Another federal case upheld the right of a noncommercial airport to impose a *Burbank*-style curfew. (*National Aviation v. City of Hayward, Cal.* (N.D.Cal. 1976) 418 F.Supp. 417, 424-425.) Virtually all the cases, including those decisions which found proprietor control of aircraft in flight federally preempted, agree that proprietor control over management of *ground facilities* has not been federally preempted. (E.g., *San Diego Unified Port Dist. v. Superior Court* (1977) 67 Cal.App.3d 361 [136 Cal.Rptr. 557]; *Air Transport Association of America v. Crotti* (N.D. Cal. 1975) 389 F.Supp. 58, 63-64.)

The majority opinion details the activities that were available to the City of Los Angeles (City) to miti-

gate the harm resulting from its extensive involvement in the creation and maintenance of this particular nuisance. (Maj. opn., *ante,* at pp. 98, 99.) For example, the City could have chosen different locations for its runways. It could have acquired buffer land by its statutory condemnation power. Ground barriers could have been constructed to deflect and diminish Los Angeles International Airport noise and adjacent structures could have been sound-proofed.

It is clear that the pertinent congressional enactments contemplate considerable federal involvement in the planning and operation of airports. The *Burbank* opinion (411 U.S. 624 [36 L.Ed.2d 54]) suggests that any noise or use restriction which substantially interferes with the federal regulatory scheme would burden interstate commerce and improperly limit the FAA's authority. However, it is also clear that substantial non-preempted regulatory activity could have been undertaken by the City.[2] This failure of the City to act is the correct basis for imposing nuisance liability. It is *not,* as the majority appear to argue, the treatment accorded property owners in inverse condemnation

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[2]Plaintiffs argue that the imposition of nuisance liability by the court for failure to undertake nonpreempted activity would itself constitute preempted regulation. This argument is untenable. Imposition of nuisance liability does not constitute regulation. The court is not advising the City on how to run its airport. It is merely making certain that the City remains responsible for the true costs associated with the airport's operation. The City retains the power to take any action it pleases. The City may acquire buffer land, soundproof the airport's runways, or continue its airport's operations and pay its neighbors for any damage that accrues. Moreover, plaintiffs' position ignores the express language of 49 United States Code section 1506 that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

cases. The majority's analogy to inverse condemnation law is not only unnecessary, it is inapposite as well.

With respect to the majority's treatment of the prejudgment interest award, it is important to underscore that the award is invalid only to the extent it represents interest on "the intangible noneconomic aspects of mental and emotional injury' claimed by plaintiffs. (Maj. opn., *ante,* at p. 103.) If plaintiffs allege specific damage that is supported by tangible evidence, prejudgment interest may properly be awarded under Civil Code section 3288. Clearly, there can be no basis in law or reason for distinguishing between awarding interest on an unauthorized withdrawal from a bank checking account, as this court did in *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814-815 [148 Cal.Rptr. 22, 582, P.2d 109], and awarding interest on a paid medical bill arising out of a defendant's tortious conduct. In both cases, the plaintiff has been deprived of the use of his money and "the accretion of wealth which [the] money . . . could have produced during [the] period of loss." (Maj. opn., *ante,* at p. 103.)

APPENDIX B.

Opinion of the Court of Appeal.

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Greater Westchester Homeowners Association, etc., et al., Plaintiffs and Respondents, v. City of Los Angeles, etc., et al., Defendants and Appellants. 2D Civ. No. 51698 (Super.Ct. No. C 931 989).

Filed: Feb. 28, 1979.

APPEAL from a judgment and an order of the Superior Court of Los Angeles County. Bernard S. Jefferson, Judge. The judgment is affirmed; the order after judgment is affirmed in part and reversed in part.

Burt Pines, City Attorney, Lawrence M. Nagin and James H. Pearson, Assistant City Attorneys, for Defendants and Appellants.

Fadem, Berger & Norton and Michael M. Berger for Plaintiffs and Respondents.

Defendant, City of Los Angeles, appeals from a judgment awarding 41 specified neighboring homeowners and various members of their families a total of $86,800 in principal damages for essentially the mental and emotional distress caused them by the nuisance of excessive noise emanating from jet aircraft using the two north runways of the municipally-owned Los Angeles International Airport (LAX), and from the order after judgment for prejudgment interest in the

total amount of $31,671.95, and for $200,000 in attorneys' fees.[1]

The City challenges the propriety of the judgment on only two grounds. The first of these is that the federal government has totally preempted the regulation of jet aircraft noise and the second is that the complained of use of jet aircraft on the two north runways of LAX is an activity done and maintained under the express authority of various statutes, etc., or their equivalent, and therefore the noise resulting from such use cannot, under Civil Code section 3482, be deemed a nuisance.

We believe both of these grounds to be without merit and will, therefore, affirm the judgment under appeal. We will, however, remand the order after judgment for the sole purpose of further proceedings to determine what attorneys' fees should be awarded plaintiffs' counsel.

DISCUSSION

I.

The Cause of Action for Nuisance herein is not Federally Preempted

The City contends to the contrary on the basis of *San Diego Unified Port Dist. v. Superior Court*

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[1]The dispute over attorneys' fees includes the question whether the compensated services of plaintiffs' counsel were rendered, at least in part, in the nuisance phase of the consolidated action as opposed to the direct condemnation portion thereof and the inverse condemnation part.

The City does not challenge on appeal any of the other costs awarded plaintiffs' counsel, nor do they challenge the sufficiency of the evidence in support of the trial court's findings and conclusions regarding the existence of the nuisance.

(1977) 67 Cal.App.3d 361, a decision of our San Diego District. In this case our Supreme Court denied hearing in April 1977 and the United States Supreme Court denied certiorari in October 1977. (*Id.* at p. 378.) Neither of these denials of review necessarily indicates, however, approval of this decision by the two high courts. (See *People v. Triggs* (1973) 8 Cal.3d 884, 891; *Maryland v. Baltimore Radio Show* (1950) 338 U.S. 912, 919 [94 L.Ed. 562, 566].)

Our San Diego District concluded that nearby homeowners could not recover tort damages from an airport proprietor for harm caused by the noise of aircraft in flight because allowing such recovery "would permit local liability for conduct within exclusive federal control." (*San Diego Unified Port Dist. v. Superior Court, supra,* 67 Cal.App.3d at pp. 363, 376-378.) The San Diego court based this conclusion primarily upon *Burbank v. Lockheed Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547], a five to four decision of the United States Supreme Court in which the majority found implied federal preemption of aircraft noise control in the existence of a pervasive scheme of federal regulation of the subject.[2] (*Id.* at pp. 633, 638.) The majority, therefore, struck down a municipal curfew ordinance prohibiting night takeoffs of jet aircraft from the airport involved (*Id.* at pp. 625-626), apparently

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[2]In this connection we note, though, that total federal preemption of an area of regulation has been rejected by the United States Supreme Court in several other fields where a pervasive scheme of federal regulation exists. (See *De Canas v. Bica* (1976) 424 U.S. 351, 356 [47 L.Ed.2d 43, 49] (immigration); *Farmer v. Carpenters* (1977) 430 U.S. 290, 295-297 [51 L.Ed.2d 338, 346-348]; *Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 198 [56 L.Ed.2d 209, 225] (labor relations); *Askew v. American Waterways Operators* (1973) 411 U.S. 325, 329, 336-337 [36 L.Ed.2d 280, 284, 288-289] (ocean oil spills).)

in the interest of national uniformity in jet aircraft flight scheduling. (*Id.* at pp. 639-640.)

The majority were careful to say, though, that the court was not considering what limits, if any, apply in this area to a municipality as a proprietor. (*Id.* at p. 635, fn. 14.) Since *Burbank,* the federal government has made clear in its monograph, entitled "Aviation Noise Abatement Policy", dated November 18, 1976, and issued by its Department of Transportation and its Federal Aviation Administration, and its Federal Aviation Administration, and in the administrative regulations regarding supersonic transports, that airport proprietors remain primarily responsible for planning and implementing action designed to reduce the effect of airport-associated noise on residents of surrounding areas (Aviation Noise Abatement Policy p. 5), and, as a result of congressional abstinence, airport proprietors remain responsible for regulation of their airports for noise abatement purposes through, among other things, noise-related airport use restrictions that are not unjustly discriminatory and do not impose an undue burden on foreign or interstate commerce. (43 Fed.Reg. 28417.)[3]

This deliberate federal refusal to preempt the local airport proprietor's responsibility for establishing and maintaining permissible levels of airport-associated noise was expressly recognized and affirmed in *British Airways Bd. v. Port Authority of New York* (2d Cir. 1977) 558 F.2d 75, 82-84. Likewise, in the second Concorde case, *British Airways v. Port Authority of*

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[3]According to the just-mentioned Department of Transportation-Federal Aviation Administration Aviation Noise Abatement Policy, dated November 18, 1976, much of the noise problem is airport-specific (p. 50) and there are at least 22 actions which an airport proprietor may wish to consider in developing an airport noise control plan. (See pp. 55-57.)

New York, Etc. (2d Cir. 1977) 564 F.2d 1002, 1010-1011, the court pointed out that the task of protecting the local population from airport noise falls upon the airport proprietor due to its intimate knowledge of local conditions, its ability to acquire the necessary property and easements and to assure compatible land use.

The fundamental fallacy of the *San Diego* decision lies in its assumption that excessive airport noise results only from the presence of jet aircraft in flight without recognizing that such possibly objectionable presence is also due to the existence of an airport whose location, runways, and noise abatement procedures, among other things, are under the direct and immediate control (subject, of course, to federal supervision) of the airport proprietor. (See *Griggs v. Allegheny County* (1962) 369 U.S. 84, 89 [7 L.Ed.2d 585, 588-589]; *City of Los Angeles v. Japan Airlines Co., Ltd.* (1974) 41 Cal.App.3d 416, 424; *National Aviation v. City of Hayward*, Cal. (N.D. Cal. 1976) 418 F.Supp. 417, 421.) In other words, airport noise control is essentially a shared responsibility of the federal government and the airport proprietor.

Moreover, the allowance of local nuisance actions against excessive airport noise constitutes a much lesser intrusion upon national aviation noise abatement policy than the local night curfew of jet aircraft takeoffs involved in the *Burbank* case.

Accordingly, we hold that the nuisance cause of action herein has not been federally preempted and,

in this connection, we call attention to the following language in the Federal Aviation Act of 1958: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. § 1506.)

II.

Civil Code Section 3482 does not Immunize the City from Nuisance Liability in this Case

Civil Code section 3482 provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The City contends that the excessive noise to plaintiffs, emanating from jet aircraft using the north runways of LAX, is expressly authorized by statute and therefore, under section 3482, cannot be deemed a nuisance.

Like the trial court, we disagree. We do not doubt that the use of these runways by jet aircraft has been duly authorized by the City, and by the state and federal governments as well, whether by way of charter, statute, regulation, permit, or otherwise. What is lacking, though, is express authority for the level of noise injurious to plaintiffs that the trial court found to have occurred in this case, and without such authority, as the trial court also concluded, section 3482's protection of the adverse effects of the activity involved, does not attach. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 938, fn. 16; *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291-292; *Hassell v. San Francisco* (1938) 11 Cal.2d 168, 171;

Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal.App.3d 116, 129.)

III.

The Award of Prejudgment Interest was Proper

Civil Code section 3288 provides, in pertinent part, that in an action for breach of an obligation not arising from a contract, interest may be given in the discretion of the jury. Where the trial involved is to the court, this direction as to whether to award prejudgment interest rests with the court. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814, fn. 16.)

We perceive no abuse of this statutory discretion in the awards of such interest here challenged. The starting dates for such interest that the trial court chose represent a midpoint between the start of the nuisance and the date of trial. (Cf. *Amador Valley Investors v. City of Livermore* (1974) 43 Cal.App.3d 483, 495.) In view of the fact that this litigation took some eight years at the trial level, the addition of prejudgment interest, while perhaps unprecedented for injury to feelings in this state and elsewhere (see Comment, *Interest as Damages in California* (1958) 5 UCLA L.Rev. 262, 264, 271; Rest., Torts, § 913(2)), seems justified in this exceptional situation. (Cf. *Moore McCormack Lines, Inc. v. Richardson* (2d Cir. 1961) 295 F.2d 583, 592-595, cert. denied 368 U.S. 989, 370 U.S. 937; *Petition of City of New York* (2d Cir. 1964) 332 F.2d 1006, 1008, cert. denied 379 U.S. 922.)

IV.

The Award of Attorneys' Fees must be Remanded for Further Proceedings

Counsel for plaintiffs were awarded $200,000 in attorneys' fees. They requested $352,960.50. The City has challenged this award as being excessive and otherwise improper,[4] and the trial court never explained what portion of this tripartite litigation its award of attorneys' fees covered—direct condemnation, inverse condemnation, and nuisance. Indeed, there is some question as to whether the plaintiffs in this case are entitled to recover their litigation expenses in direct condemnation under what is now Code of Civil Procedure section 1250.410. On the other hand, they are clearly entitled, pursuant to what is now Code of Civil Procedure section 1036, to the recovery of reasonable attorneys' fees for the work they did in the inverse condemnation aspect of this case.[5] But there would appear to be no basis whatsoever upon which they could be awarded attorneys' fees for the work they

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[4]Counsel for the City challenged 2,345.2 hours of the 4.296.4 hours claimed. The challenged time items were circled in red for the guidance of the trial court. Counsel for plaintiffs argued that they were entitled to twice their normal hourly rate because of the extraordinary length of the case and the uncertainty of their compensation. In addition, they pointed out that the case was unusually complex and had originally involved some 600 plaintiffs.

[5]Acording to counsel for the City, the recovery in the direct condemnation phase of this case (14 parcels) totals $720,000, which was only $56,000 more than the total amount of money the City offered for those parcels. Counsel for plaintiffs charged their clients according to their time records, $90,492.28 for their work in the direct condemnation proceedings, and $12,366.64 for their work in the inverse condemnation proceedings.

did in the nuisance phase of the case. (See Code Civ. Proc., § 1021; *Davis v. Air Technical Industries, Inc.* (1978) 22 Cal. 3d 1, 5; *Twentieth Century-Fox Film Corp. v. Harbor Ins. Co.* (1978) 85 Cal.App. 3d 105, 112-113.)

DISPOSITION

The judgment under appeal is affirmed. The order after judgment under appeal is affirmed in all respects except the provision therein for attorneys' fees, as to which it is reversed. The case is remanded to the trial court for the sole purpose of further proceedings to determine the proper amount of attorneys' fees to be awarded counsel for plaintiffs in this case, including what, if any, fees should be awarded them for their services on this appeal. Plaintiffs are otherwise awarded their costs on appeal.

CERTIFIED FOR PUBLICATION

Cobey, *J.*

We concur:

Klein, *P.J.*

Allport, *J.*

APPENDIX C.

Memorandum Opinion Re Intended Decision Regarding Recovery for Personal Injury and Emotional and Mental Distress.

Superior Court of the State of California for the County of Los Angeles.

Greater Westchester Homeowners' Association, etc., et al., Plaintiffs, vs. City of Los Angeles, etc., et al., Defendants. No. C 931 989.

This represents the final phase of the above-entitled action and involves the right of homeowners and family members to recover for personal injury and emotional and mental distress as a result of noise from jet aircraft using the North Runways of the Los Angeles International Airport. Two issues have already been determined in this litigation. One issue involved the fair market values of the homes sought to be acquired by the Airport for Airport uses in direct condemnation or eminent domain proceedings. The second issue previously determined involved the right of certain homeowners to recover in inverse condemnation for diminution in market values of their properties resulting from jet aircraft noise. The jury determined the awards in the first phase of this case dealing with these two issues. Plaintiffs in this case are all homeowners and their families living in the Westchester area adjacent to the North Runways.

The final phase of this action deals with the right of the same homeowners involved in the first phase of the action to recover from the City of Los Angeles damages for personal injury, annoyance, discomfort, and emotional and mental distress in addition to the amounts recovered for the market values of the homes

acquired for Airport use, or for the diminution in market values of the homes not sought to be acquired by the City. The theory upon which plaintiffs seek to recover damages for personal injury, mental and emotional distress, annoyance and discomfort caused by noise from jet aircraft operating in and out of the Los Angeles International Airport on the North Runways is that such operation by the Airport constitutes a "*nuisance.*" Plaintiffs rely for this theory of recovery upon the Supreme Court case of *Nestle vs. City of Santa Monica* (1972) 6 Cal.3d 920, 101 Cal.Rptr. 568. Plaintiffs urge that the *Nestle* case holds that jet aircraft noise from an airport's operation creates a cause of action in favor of homeowners and their families affected for personal injury and emotional and mental distress suffered by virtue of the provisions of Civil Code Section 3479.

Civil Code Section 3479 defines a nuisance as "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, . . ." Defendant City seeks to avoid the effect of *Nestle* by asserting that the actual holding of *Nestle* is limited to a determination that the governmental immunity provisions of Government Code Section 815 do not bar a cause of action for nuisance against a governmental agency. Defendant City takes the position that *Nestle* does not deal with the effect of Civil Code Section 3482, which is a limitation upon Civil Code Section 3479, the section which defines a nuisance. Civil Code Section 3482 provides that: "Nothing which is done or maintained under *the express* authority of a statute can be deemed a nuisance." Defendant City contends that

the flight of commercial jet aircraft to and from the Los Angeles International Airport is expressly authorized under the terms of cited applicable local, state and federal statutes and that, consequently, jet aircraft flying to and from said Airport cannot be held to be a nuisance.

But Civil Code Section 3482 cannot be given the broad interpretation sought by defendant City. In *Venuto vs. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 128, 99 Cal.Rptr. 350, the court stated that: "Adverting to section 3482 of the Civil Code, we note that the statute applies only to a *specific act authorized.*" (Emphasis added.) *Venuto* cites as its authority for this interpretation of Civil Code Section 3482 the cases of *Hassell vs. San Francisco* (1938) 11 Cal.2d 168, 78 P.2d 1021; *People vs. Glenn-Colusa Irr. Dist.* (1932) 127 Cal.App. 30, 15 P.2d 549; and *Ambrosini vs. Alisal Sanitary Dist.* (1957) 154 Cal.App.2d 720, 317 P.2d 33.

In describing its analysis of Civil Code Section 3482, the *Venuto* court added: "Accordingly, although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance." (Emphasis in original.) (22 Cal.App.3d 116 at p. 129) Applying the principles stated in *Venuto* to the case at bench leads to the inevitable conclusion that the cited applicable state and federal statutes and regulations do *not* authorize the "specific act" of jet aircraft noise over and near the plaintiffs' homes of the magnitude and frequency to be injurious to health or indecent or offensive to the senses so as to interfere with the comfortable enjoyment of life or property—which constitutes a nuisance as defined by Civil Code Section 3479.

It is reasonable to conclude that although the "activity" of conducting the Los Angeles International Airport is authorized by statute and cannot therefore be considered a nuisance solely by reason of the defendant City's conducting such "activity," the "manner" in which such activity is performed may constitute a nuisance. The defendant City's acts of permitting jet aircraft to use the runways of the Los Angeles International Airport and emit the kind of noise which is injurious to health or offensive to the senses so as to interfere with plaintiffs' comfortable enjoyment of their homes constitute a *method* and *manner* of operating said Airport that creates a nuisance for which the defendant City becomes liable in damages.

Although the actual holding of *Nestle* is limited in the way in which defendant City asserts it to be, a careful reading of *Nestle* leads to the conclusion that the *dicta* of *Nestle* must be construed as strongly supporting the views of the *Venuto* case. In discussing its holding that governmental immunity cannot be considered a bar to the liability of a governmental entity for a nuisance under Civil Code Section 3479, the *Nestle* court states that the airport noise problem "vividly demonstrates the difficulties encountered in engrafting traditional common law theories of recovery onto proceedings involving injuries *peculiary contemporary in nature.*" (Emphasis added.) (6 Cal.3d 920 at p. 924) Also, in *Nestle,* the trial judge had ruled that plaintiffs had failed to state facts in their pleadings sufficient to state a cause of action for nuisance. The *Nestle* court held that the plaintiffs should be allowed to amend their complaint to *allege personal injuries* suffered as a result of the purported nuisance, and cited *Kornoff vs. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 288 P.2d 507.

That *Nestle* intended its *dicta* to be of significant consequence is seen from this additional statement made by the court after its reference to the problems of engrafting traditional common law theories of recovery onto proceedings involving injuries peculiarly contemporary in nature: "Despite the dilemma, however, we recall Justice Cardozo's admonition that '[t]hose who would earn [the common law's] best rewards must make their knowledge as deep as the science and as broad and universal as the culture of their day.' " (6 Cal.3d 920 at p. 924)

Also, it is to be noted that the *Nestle* court discusses the Legislature's intention derived from the 1970 legislation which rejected the Law Revision Commission's recommendations for legislation to bar suits against public entities based on a "nuisance" theory. In this respect, the *Nestle* court stated: "[C]onsequently it is manifest that the Legislature intended to allow such causes of action if they could be tailored to meet the specifications of statutory provisions, such as section 3479 of the Civil Code." (6 Cal.3d 920 at p. 936) The *Nestle* court then bolstered this view of the Legislature's intention by adding that "[t]his conclusion is further supported by the profound interest the 1970 Legislature demonstrated in the eradication of the evils caused by the various forms of pollution, with particular emphasis on noise pollution. Since it is well-documented that a nuisance theory provides an effective means for redress in a wide range of actions resulting from pollution including noise disturbance, it appears that, in deleting the commission's recommendation to preclude governmental nuisance liability, the Legislature intended to preserve this additional weapon in the arsenal available to combat grievous injury to the environment." (6 Cal.3d 920 at p. 936)

That the *Nestle* court intended to set forth a strong position that Civil Code Section 3482 should *not* constitute a bar to airport noise damage suits brought against airports on the theory of nuisance, is evident from the court's statements in footnote 16 on page 938 of the opinion. Here the court refers to the fact that the trial judge in *Nestle* concluded as a matter of law that the Santa Monica Airport was not a nuisance because it was maintained under the authority of several statutes which made Civil Code Section 3482 applicable in its mandate that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." The court then points out that it was contended in *Hassell vs. San Francisco* (1938) 11 Cal.2d 168, 78 P.2d 1021, that because of Civil Code Section 3482, the construction of a public convenience station could not constitute a nuisance, but that in rejecting that argument in *Hassell*, the Supreme Court interpreted Section 3482 in a strict and narrow fashion as requiring that a statute must authorize the "*very act* which occasions the injury." (Emphasis added.) (11 Cal.2d 168 at p. 171)

Defendant City also takes the position that in the absence of proof of a true physical injury, plaintiffs are not entitled to recover damages on a nuisance theory because other items of damage, such as loss of use and enjoyment of their homes, have been included in the compensation certain of the plaintiffs as homeowners have already received by way of market value for their homes acquired by the Airport, or by way of damages for the diminution in the market values of homes not sought to be acquired by the Airport and still owned by the remaining plaintiffs. In support of this position, defendant City points out

that the damage item for loss of use and enjoyment of residential property resulting from jet aircraft noise, for which plaintiffs have already received such compensation, is based upon factors such as (1) sleep interference, (2) interference with speech and telephone communications, (3) interference with radio and television communication and enjoyment, (4) interference with the use of the out-of-doors portions of the home, (5) making entertainment of friends in the home practically impossible, (6) difficulties in finding persons willing to purchase the homes, and (7) difficulties in obtaining financing or loans from lending institutions.

Defendant City thus concludes that if recovery is permitted for such factors on the theory that they constitute damage to the person resulting from jet aircraft noise as a nuisance, plaintiffs will be receiving double recovery from the same acts of defendant City. Defendant City also alludes to the fact that this court previously ruled in the property-taking and property-damaging phase of the trial that plaintiffs were not entitled to recover, as a separate item of damages, for loss of use and enjoyment of their homes under the doctrine of *Klopping vs. City of Whittier* (1972) 8 Cal.3d 39, 104 Cal.Rptr. 1. The *Klopping* case established a rule for recovery of special damages to property in condemnation actions based upon the depressing effect upon market value of property of an unreasonable delay by a condemning agency in filing a condemnation action after making a precondemnation announcement of the intent to condemn, or in taking any other unreasonable action before a condemnation action was instituted which resulted in a diminution in the market value of an owner's property. But this court's ruling that plaintiffs were not entitled to recover

special damages for such items as loss of use and enjoyment under the *Klopping* doctrine has no bearing on the question of whether loss of enjoyment and use of residential property by an owner-occupant can be an item of damage to the *person*, as distinct from the question of the effect of loss of enjoyment and use in causing a diminution in the market value of an owner's property.

In addition to the question of whether loss of use and enjoyment of residential property as a compensable item is limited to its effect upon market value, we have the question of whether physical injury to the person is required before a person may recover damages on the ground of a nuisance for a *nonproperty* injury. That no physical injury to the person is required in order for a homeowner to recover damages for a non-property injury suffered from a nuisance, along with a property injury suffered in the form of physical injury to the home or a reduction in its market value, has been decided by the California Supreme Court in several cases.

But what kind of injury to the person that is not a physical injury will suffice to constitute a compensable item of damage for a defendant's nuisance? The decisional law indicates that a loss to the homeowner of the use and enjoyment of his home which results in his annoyance, discomfort, mental or emotional distress is a compensable injury insofar as a cause of action for trespass or a nuisance is concerned. This has been the law of nuisance long before the advent of jet aircraft.

In *Judson vs. L. A. Suburban Gas Co.* (1910) 157 Cal. 168, 171, 106 P. 581, the court stated the rule to be that "it is not necessary that the health of plaintiff or of members of his household should have been

impaired. It is sufficient if the odors, sounds, and smoke were offensive to the senses." This view was reiterated in the more recent case of *Kornoff vs. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 288 P.2d 507, a trespass case. The defendant argued that damages for discomfort and annoyance were erroneously awarded to plaintiffs since no physical injury to the person was proved. But the court rejected this argument and stated: "It appears to us that the *discomfort* and *annoyance* suffered by plaintiffs is an injury directly and proximately caused by defendant's invasion of their property and that such damages would naturally result from such an invasion. It also appears to us that *discomfort* and *annoyance* may be suffered where there is no physical injury suffered." (Emphasis added.) (45 Cal.2d 265 at p. 272)

The *Kornoff* court also stated the rule to be that "[t]he California cases appear to draw no distinction between cases involving nuisance and those involving trespass in permitting an award of damages for discomfort and annoyance directly resulting from an injury to real property. There seems to be no sound reason to refuse to award damages for discomfort and annoyance where the only injury is to the real property since it is obvious that such an injury may cause discomfort and annoyance *without also causing an actual physical injury to the person.*" (Emphasis added.) (45 Cal.2d 265 at p. 275)

Another case of significance on the question of the kinds of injury for which recovery is allowed in a nuisance action is *Herzog vs. Grosso* (1953) 41 Cal.2d 219, 259 P.2d 429. The *Herzog* court considered as relevant the trial court's finding that "as a direct, natural and proximate result and consequence of the

acts and conduct of the defendant . . . each of said plaintiffs were caused further to suffer nervousness, worry, and mental distress for the safety of themselves and their daughter and others." (41 Cal.2d 219 at p. 225) This finding was deemed relevant under the principle that "[o]nce a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom." (41 Cal.2d 219 at p. 225)

In the *Kornoff* case, the defendant challenged the validity of *Herzog* to support a homeowner's recovery for annoyance and discomfort resulting from a nuisance by advancing the theory that the lack of sleep, fear and shock suffered by plaintiff in *Herzog* were actual injuries to the person and that discomfort and annoyance are recoverable items of damage in a nuisance or trespass case only if such items constitute an integral part of actual injury to the person. But *Kornoff* rejected this suggested interpretation of *Herzog* by stating: "We do not so construe *Herzog v. Grosso.* We specifically held that annoyance and discomfort were *natural consequences of such 'an invasion of a protectible interest in real property.'* " (Emphasis in original.) *Kornoff vs. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 273, 288 P.2d 507)

Kornoff was followed a few years later by *Acadia, California, Ltd. vs. Herbert* (1960) 54 Cal.2d 328, 337, 353 P.2d 294, in which the same principle was enunciated as follows: "It is settled that, regardless of whether the occupant of land has sustained physical injury, he may recover damages for the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear

for the safety of himself and his family when such discomfort or suffering has been proximately caused by a trespass or a nuisance."

Kornoff, Herzog, Acadia and *Judson,* therefore, constitute unquestioned authority for the rule that even if the nuisance created by a defendant is not of the type to cause physical illness, if it is of the type to cause a homeowner annoyance and discomfort, such annoyance and discomfort constitute recoverable elements of damage.

Although none of those cases involved recovery for damage from jet aircraft noise as a nuisance, there is no reason for making any distinction between a nuisance resulting from jet aircraft noise and a nuisance resulting from other forms of noxious odors, vibrations or sounds.

Although it may be labeled *dicta,* the California Supreme Court has indicated that the elements of damages resulting from a nuisance caused by jet aircraft noise fall in the same category as the elements of damage that are recoverable in the case of other forms of nuisance. In *City of San Jose vs. Superior Court* (1974) 12 Cal.3d 447, 115 Cal.Rptr. 797, the court rejected the concept that certain property owners could maintain, on behalf of all property owners in an area, a class action against an airport operator for a nuisance arising out of noise emanating from jet aircraft landing and taking off from such airport. One basis of rejection of the propriety of a class action lay in the court's view that the elements of damages recoverable for a nuisance were too varied and individualized to permit certain plaintiffs to represent all members of the class. Thus the *San Jose* court stated: "Damages recoverable in a successful nuisance action include not only diminu-

tion in market value but also damages for annoyance, inconvenience, and discomfort." (12 Cal.3d 447 at p. 464)

In light of the decisional-law history of damage recoveries in nuisance actions, this court concludes that California law permits, on a nuisance theory, recovery for damages suffered from jet aircraft noise in the form of personal injury, annoyance, inconvenience, discomfort, mental distress and emotional distess to the residential property owner and members of his family affected, in addition to damages in the form of a diminution in market value of such residential property.

Accordingly, this court must reject defendant City's contention that the damage element—diminution in market value of real property—includes the elements of annoyance, inconvenience, discomfort, mental and emotional distress to the owner so as to preclude any additional recovery for these latter items. There is no element of double recovery involved in permitting plaintiffs to recover damages both for diminution in market value of their residential properties and for the items of annoyance, discomfort, emotional and mental distress suffered by such plaintiffs as a result of the invasion of their homes by noise from jet aircraft using the North Runways of the Los Angeles International Airport, such noise being of sufficient severity and regularity to constitute a nuisance.

We now turn to the question of whether the noise from jet aircraft landing on and taking off from the North Runways of the Los Angeles International Airport was such as to constitute a nuisance within the meaning of Civil Code Section 3479. The test is simply whether, with respect to a particular parcel of residen-

tial property, the jet aircraft noise was of sufficient severity and regularity to be injurious to the health or indecent or offensive to the senses so as to interfere with the owner's comfortable enjoyment of his property.

The parties herein have stipulated and agreed that the evidence introduced in the property-taking and property-damaging phase of the trial—the direct condemnation and the inverse condemnation phase—is to be applicable to the nuisance phase—the personal injury and other nonproperty damage phase, to the extent that such evidence is relevant to the latter issues.

The evidence introduced in this action is voluminous. Expert testimony was presented relating to the fields of acoustics, sound analysis and measurements and the effects of noise on people in terms of consequences to hearing and other bodily functions.

The measurement of sound and noise has become fairly standardized. Through the use of a sound meter the maximum level of noise—unwanted sound—from any source is easily measurable. This physical measurement of sound or noise is recorded in terms of decibels on what is described as the A scale [dB(A)]. But the important consideration in terms of noise is how the human ear responds to sounds. A more accurate measurement in terms of the human response to sounds is known as the perceived noise level in decibels (PNd B). The PNdB measurement takes into account the various frequencies of any sound or noise event. Thus, a PNdB measurement of the noise from a jet aircraft engine will evaluate the fact that such noise comprises a sound spectrum made up of high frequency sounds as well as low frequency sounds and that the high frequency sounds are far more irritating to the human ear than are the low frequency sounds.

The evidence in this case at bench establishes that several methods have evolved for measuring jet aircraft noise in terms of multiple jet aircraft that use the runways of an airport on a daily basis. The methods of such noise measurements have evolved in an effort to determine or predict the probable effects of such multiple jet aircraft noise on residents living adjacent to airport runways. The specific concern in the case at bench is the effects of noise from jet aircraft that used the *North* Runways of the Los Angeles International Airport on those plaintiffs who were, and on some plaintiffs who still are, residents of the Westchester residential community adjacent to such North Runways.

All of the various methods of measurement of noise from jet aircaft using an airport are designed to take into account the cumulative effects from a number of factors—the fact that some types of jet aircraft are noisier than others, the difference in noise levels generated by aircraft take-offs from aircraft landings, the number of flights per day, and the fact that night flights are more disturbing to residents than are day flights because of the interference with sleep. Thus, it is recognized that the older types of jet aircraft such as the Boeing 707 and 727, the Douglas DC-8 and DC-9 are noisier than the later and newer models such as the Boeing 747, the Douglas DC-10 and the Lockheed L-1011. But the fleet of jet aircraft that uses the North Runways of the Los Angeles International Airport is still composed of a substantial number of the earlier and noisier jet aircraft models.

The purpose sought by the various methods developed for measuring jet aircraft noise in its cumulative effect is to express in a *single* decibel value the com-

munity's response to such noise over a daily, 24-hour period. Fluctuating noise levels over a given period of time is thus converted to a single-number equivalent. By use of these various noise measurement processes, contours or zones around the Los Angeles International Airport have been drawn to reflect specified noise levels or values at any location within a given radius of the runways--the two North Runways and the two South Runways.

The evidence presented by plaintiffs emphasizes the Composite Noise Rating (CNR) method of evaluating the cumulative effects of noise from jet aircraft operations. The CNR contours are based on the use of Perceived Noise Level measurements in terms of decibels (PNLdB). The CNR noise values are also based on a consideration that the person affected by jet aircraft noise has been subjected to such noise for a minimum period of six months. This eliminates from consideration the annoyance or discomfort experienced upon initial exposure to noise of this character.

The CNR contours are composed of three zones. Zone 1 is farthest from the North Runways and the CNR noise value or rating for this zone begins at 100 PNdB and decreases in decibel rating as the distance from the North Runways increases. Zone 2 has as its outer limits the 100 decibel line of Zone 1 and increases in excess of 100 PNdB as Zone 2 reaches Zone 3 where the decibel rating starts at 115 PNdB and increases in decibel rating as the area gets nearer to the North Runways.

According to studies of human responses by residents living near airports, the jet aircraft noise produced in CNR Zone 1, with its rating of less than 100 PNdB, causes few complaints from residents of Zone

1. But in CNR Zone 2, with its decibel rating of 100 to 115 PNdB, jet aircraft noise results in individual vigorous complaints from residents of Zone 2. And in CNR Zone 3, with its decibel rating in excess of 115 PNdB, jet aircraft noise results in concerted group action by residents of Zone 3.

According to some of the testimony, when a CNR rating reaches around 112 to 113 PNdB, three out of four residents will be annoyed; that at a CNR of around 100 PNdB, approximately one out of every two residents will be annoyed; but that at a CNR value of approximately 90 PNdB, only one out of every four persons subject to such noise exposure will be annoyed.

The CNR contours with the three zones were constructed on the assumption that, on an average daily basis, there were between two hundred and three hundred jet aircraft landings and take-offs on the North Runways of the Los Angeles International Airport. The evidence sustains this assumption. The jury in this case at bench made a finding that as of December 31, 1971, the average number of flights per day, including landings and take-offs, by jet aircraft, was 322 for Runway 24-L, the southerly of the two North Runways, and 26 for Runway 24-R, the northerly of the two North Runways.

In the Greater Westchester area, a portion of CNR Zone 2 includes an area north of Manchester Avenue and for a number of blocks extending east and west of Sepulveda Boulevard. CNR Zone 3 has its northerly boundary roughly along 88th and 90th Streets, which is north of the two North Runways in the Greater Westchester area, and its southerly boundary along

a line south of the two South Runways, 25-L and 25-R.

Most of the plaintiffs in the case at bench were residents of either Zone 3 or Zone 2.

The evidence presented by defendant City emphasizes the Community Noise Equivalent Level (CNEL) method of measuring and evaluating jet aircraft noise and community response thereto. The CNEL methodology is similar to the CNR method in its purpose—to express in a single number the noise level and the community response to such noise level over an average 24-hour period.

The CNEL method starts with the Single Event Noise Exposure Level (SENEL) which analyzes the sound produced during an entire single noise event such as one jet aircraft take-off. This includes more than the peak level moment. The CNEL value is arrived at by considering all the single event noise exposures over a 24-hour period and obtaining an average, but giving added weight to the night-time single events from 7:00 p.m. to 10:00 p.m. and to such single events from 10:00 p.m. to 7:00 a.m

An expert witness for the defendant City postulated that the CNEL method of evaluating noise was designed as a simpler method of measuring noise than the prior methods of decibels on the (A) scale [dB(A)], the Perceived Noise Level (PNdB), the Day-Night Level (LDN), the Noise Exposure Forecast (NEF) and the Composite Noise Rating (CNR). The claim of simplicity for the CNEL concept rests on the fact that it uses as its base the Single Event Noise Exposure Level (SENEL) which is calculated from sound meter decibel readings on the (A) scale [dB(A)] rather

than from judgmental factors involved in the Perceived Noise Level (PNdB) weighting process which is used in the CNR method.

CNEL contours were developed for the Los Angeles International Airport. Separate contours were drawn for CNEL values of 60dB, 65dB, 70dB, 75dB and 80dB. A comparison of CNEL values and CNR values indicates that the CNEL method produces a lower decibel value two-thirds of the time than the CNR method produces. The difference in decibel values between the CNEL and the CNR methods leads to the conclusion that, under the CNEL contours, particular residential locations near the Airport are less likely to result in owners' complaints from jet aircraft noise than that provided by the CNEL method. But this contours.

There is no dispute among the expert witnesses that the dB(A) scale of noise measurement used in the CNEL concept is a cruder measuring device than the PNdB scale used in the CNR concept. This conclusion results from the fact that measuring noise by the PNdB scale more adequately takes into account human reactions to the higher noise frequencies of a sound event than does the dB(A) scale. The high frequency sounds of the sound spectrum that make up a sound event are simply more objectionable and obnoxious to the human ear than are the low frequency sounds.

In terms of its evidentiary use on the issue of whether jet aircraft noise at a particular residential location constitutes a nuisance or not, the court finds that the CNR method provides evidence of greater credibility than that provided by the CNEL method. But this court is unwilling to adopt the thesis that jet aircraft noise is automatically a nuisance as to all residential

properties located in CNR Zones 2 or 3 and is automatically not a nuisance as to all residential properties located in CNR Zone 1. Neither the CNR method of evaluating jet aircraft noise nor the CNEL method can be accepted as compelling evidence that such noise at any particular location automatically comes within the definition of a nuisance under Civil Code Section 3479.

The court and jury in this case at bench took an extensive view of the area involved and heard the jet aircraft noise at different locations and at different hours of the day. This view constitutes evidence along with all other evidence presented to be considered by this court in determining whether jet aircraft noise constituted a nuisance at the residential location of each plaintiff seeking to recover damages from the defendant City on a nuisance theory.

All of the evidence in this case at bench satisfies this court that the noise from jet aircraft using the North Runways constitutes a nuisance as to the residential location of each of the plaintiffs except that of the Tadenz Dudzinski family located at 8359 Kenyon Avenue, located in CNR Zone 1 with a noise value or level less than 100 PNdB. The residential locations of all other plaintiffs are in CNR Zone 2 with a noise value or level of between 100 and 115 PNdB, or in CNR Zone 3 with a noise value or level in excess of 115 PNdB. This finding of nuisance is based on this court's determination that at each such residential location the noise from jet aircraft using the North Runways has been of such duration, intensity and obnoxious character as to cause a diminution in market value of the property at such location and to be injurious to health and offensive to the senses so as

to interfere with the family's comfortable enjoyment of life and of such property.

We turn next to the question of proof of damages sustained by plaintiffs. The period of time we are concerned with in this phase of the case begins with June 1967 when commercial jet aircraft were authorized to land and take off from the first North Runway, 24-L. In June of 1970, construction of the second North Runway, 24-R, was completed and commercial jet aircraft were authorized to land and take off from this runway on a regular basis. Thus, the nuisance for which damages must be calculated was created beginning in June 1967.

For the most part, plaintiffs' claims of physical injuries resulting from jet aircraft noise are unsubstantiated by the evidence. Practically no medical testimony was offered to prove any physical injury. In the case of one plaintiff, however, her family physician testified that she had physical problems that were aggravated by emotional distress suffered from the jet aircraft noise.

An ear, nose and throat specialist testified that he had sent twenty plaintiffs to a laboratory for hearing tests and that the hearing loss indicated for nine of these plaintiffs could have been due to jet aircraft noise. This opinion was based in great measure upon a history obtained from the plaintiffs in order to rule out causes of hearing loss or impairment other than jet aircraft noise. But this history was filled out by the plaintiffs at their homes on a form supplied by the physician. The physician did not discuss personally with the plaintiffs any hearing problems they may have experienced. The laboratory hearing tests were performed shortly before the final phase of the trial commenced.

It is important to note that the physician-witness' testimonial opinion regarding the cause of the hearing losses or impairments diagnosed for the nine plaintiffs was couched primarily in terms of a *possibility* that such hearing losses or impariments were the results of jet aircraft noise rather than in terms of reasonable medical probability or certainty. There was conflicting testimony by experts as to whether jet aircraft noise can cause permanent hearing loss or impariment. But none of these experts made any examination of plaintiffs to determine whether there had been any hearing loss or hearing impairment suffered from any cause. The evidence presented as to hearing impairment or hearing loss must be considered as conjecture and speculation. The court concludes, therefore, that plaintiffs have not sustained their burden of proving that any significant hearing loss or hearing impairment was suffered by any plaintiff as a result of jet aircraft noise.

The testimony of the plaintiffs as to the effects suffered by them from jet aircraft noise was, for the most part, along similar lines. This testimony established that the jet aircraft noise interfered with person-to-person conversation in the home, with the ability to engage in normal telephonic communication, with the ability to enjoy the use of the out-of-doors portion of their property and with the ability to hear and enjoy television programs; that such noise caused frequent arousal from sleep and, in some cases, interfered with the ability to engage in or to enjoy sexual relations. With respect to family members of school age, the testimony was to the effect that the jet aircraft noise interfered with the ability to study in the home.

There was testimony that as a result of these noise interference factors, plaintiffs developed a sense or feeling of annoyance, strain, worry, anger, frustration, ner-

vousness, fear, and irritability toward other family members. These are all appropriate elements of nuisance damage which may be classified, for convenience, under the general heading of mental and emotional distress.

There was wide variation, however, in the testimony between plaintiffs as to the degree of mental and emotional distress flowing from such elements. The evidence convinces the court that the mental and emotional distress caused by jet aircraft noise was very slight as to some plaintiffs while moderate and substantial as to others. But the evidence failed to establish that any plaintiff suffered a severe or grievous degree of mental or emotional distress as a result of the jet aircraft noise.

Much of the testimony as to anger, frustration and emotional disturbance was related to causes other than the jet aircraft noise. Thus, some of the plaintiffs developed a sense of frustration and anger because the Airport expansion was changing the character of the Westchester residential community. Some of the plaintiffs were resentful of the fact that the Airport could acquire their homes through eminent domain proceedings. Others became upset at the Airport because of what they considered to be offers to purchase their properties at prices below market value. Some plaintiffs testified to substantial emotional and mental conditions that developed while such plaintiffs were subject to jet aircraft noise. But in these instances, the evidence points clearly to the fact that such conditions were caused by family problems of one kind or another and not by the jet aircraft noise.

These elements of anger, resentment, frustration and other emotional and mental distress that result from causes other than that of jet aircraft noise are not compensable items.

In determining the amount of damages to be awarded for the nonproperty elements of nuisance damage classified as mental and emotional distress, the court has taken into consideration the degree of such distress which the evidence establishes each plaintiff was caused to suffer from jet aircraft noise and the length of time that such plaintiff was subjected to the jet aircraft noise.

The evidence reflects that a few plaintiffs moved into the Westchester area after the commencement of jet aircraft operations to and from the North Runways. As to these plaintiffs, the defendant City asserts that their claims ought to be precluded by the defense of assumption of risk. But is assumption of risk a defense to a cause of action for a nuisance? In an early case, *Learned v. Castle* (1889) 78 Cal. 454, 18 P. 872, the court declared that the acquiescence of plaintiff's grantor in an act of the defendant that constituted a nuisance was no defense to plaintiff's cause of action for an injunction against a continuance of the nuisance.

In *Williams v. Blue Bird Laundry Co.* (1927) 85 Cal.App. 388, 259 P. 484, one question presented was the right of plaintiff who had built a residence in an area where defendant laundry was already operating to maintain a nuisance action against the laundry. The court held that plaintiff was not barred from relief and stated the rule to be as follows: "It seems to be assumed that because the premises on which the laundry is situated were zoned to permit the maintenance of such establishments, all persons building residences in that vicinity must submit to such discomforts and injuries as are ordinarily incident to the operation of similar industries in the manner in which they

are customarily conducted. We do not understand this to be the law. The doctrine of *coming to a nuisance* was long ago exploded." (Emphasis added.) (85 Cal. App. 388 at p. 392)

The *Learned and Williams* cases set forth the rule that a plaintiff's coming into an area where a nuisance is operating does not bar such plaintiff from maintaining an action for an existing nuisance. It follows, therefore, that assumption of risk is not a defense to an action to recover damages for a nuisance.

There is an additional matter which requires discussion in terms of the effects of plaintiffs' rights of recovery in this jet aircraft noise litigation based upon a *nuisance* theory. A few of the plaintiffs involved in this litigation are plaintiffs whose properties have not been sought to be taken by the defendant City in any direct condemnation action. The question which this court raises is as to the transitory or terminal nature of the recovery which this court is granting to these plaintiffs for emotional and mental distress. In *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 101 Cal.Rptr. 568, the court discusses the question of whether jet aircraft noise constitutes a continuing nuisance because of the defense involved of the statute of limitations. The *Nestle* court remarked: "If appellants demonstrate that whatever nuisance caused by defendant is continuing in nature, every repetition of the wrong may create further liability. Hence the statute of limitations would not run merely from the original intrusion. This is the well-settled rule with respect to property damage (citation), and it would be incongruous for each repetition to be considered a separate wrong for property damage purposes but not for personal injuries. To the extent *Strzelczyk v. Marki* (1959)

169 Cal.App.2d 703 [337 P.2d 846], adopts a contrary position, it is disapproved. Accordingly, if the statute of limitations becomes an issue, the trial court must determine whether nuisance causing personal injury loss has concluded or is continuing and then apply the appropriate statute of limitations principles." (6 Cal.3d 920 at p. 937)

The plaintiffs who are being awarded damages for mental and emotional distress and who still reside at the same addresses are the *Ferrers,* 8701 Lilienthal Avenue; the *Heaps,* 8820 Lilienthal Avenue; the *Lemons,* 8721 Lilienthal Avenue; and the *Citros,* 5951 West 86th Place. Under the authority of the *Nestle* case, the noise from jet aircraft using the North Runways will continue to constitute a nuisance at these addresses unless there is a substantial reduction in the decibel noise level in the future. The awards to these plaintiffs will not constitute a bar to future claims by these plaintiffs against the defendant City for damages for the continuing emotional and mental distress caused by the *continuing nuisance* of noise from jet aircraft that use the North Runways.

In addition to the above four plaintiff families, there are undoubtedly other homeowners in the same general area or in other areas of CNR Zones 2 and 3 as to whom the jet aircraft noise constitutes a nuisance and whose homes the defendant City has not sought to purchase by agreement or acquire through condemnation proceedings for Airport use.

If the City of Los Angeles desires to avoid the continuing liability for jet aircraft noise that constitutes a nuisance and causes physical injury or emotional and mental distress to homeowners such as the Ferrers, Heaps, Citros and Lemons and others living in CNR

Zones 2 and 3, several alternatives come readily to mind.

One alternative is for the City of Los Angeles to secure a substantial reduction in the jet aircraft decibel noise level at the home locations involved in order to terminate the jet aircraft noise as a nuisance. A second alternative is for the City to acquire these homes from their owners for Airport purposes through voluntary agreements with such owners or through direct condemnation actions. A third alternative that has been suggested is that of soundproofing these residential properties.

It may be contended that neither the remedy of a reduction in the jet aircraft noise level nor the remedy of soundproofing of the residential properties involved is a feasible or practical solution in the near future. Certainly, it is not for this court to suggest which, if either, of these two alternatives, offers a practical or feasible solution to the continuing nuisance created by jet aircraft noise.

But this court does suggest unequivocally and unhesitatingly that homeowners ought not to be forced to live with the present situation of being subject to the nuisance of jet aircraft noise and be content with the remedy of suing the City of Los Angeles periodically for damages for physical injuries or mental and emotional distress that may result from such jet aircraft noise.

We turn next to the matter of fixing the amount of damages to be awarded plaintiffs for the physical, mental and emotional distress suffered as a result of the nuisance of jet aircraft noise invading their homes.

BOOSALIS. The residence location was 9428 Fleetwing Avenue. The period the family lived at this address was approximately one year in 1967-1968. The awards are as follows:

Anthony Boosalis	$ 700.00
Barbara Boosalis	400.00
Dorothy Boosalis	400.00
Anthony Boosalis, Jr.	400.00
Christine Boosalis, Whitney	400.00

CITRO. The residence location is 5951 West 86th Place. The period for which damages are awarded is from 1967 to date. The awards are as follows:

Sam Citro	$3,200.00
Mamie Citro	3,200.00

DAILEY. The residence location was 9512 Hoxey Avenue. The period for which damages are awarded covers a five-year period from 1967 to 1972 for Janette Dailey and Don Dailey, and a seven-month period divided between 1967 and 1970 for Gail Dailey Williamson and Roblyn Williamson. The awards are as follows:

Janette Dailey	$5,000.00
Don Dailey	1,700.00
Gail Dailey Williamson	400.00
Roblyn Williamson	400.00
Rebecca Williamson -	No Recovery

DECKER. The residence location was 9401 Goebel Avenue. The period for which damages are awarded covers close to seven years, from 1967 to 1974, for Mahria Decker and Deborah Decker, and approxi-

mately four and one-half years, from 1967 to 1972, for Gregory Decker. The awards are as follows:

Mahria Decker		$3,500.00
Gregory Decker		1,600.00
Deborah Decker		2,500.00
Alexander Decker	-	No Recovery

FERRER. The residence location is 8701 Lilienthal Avenue. The period for which damages are awarded is from 1967 to date for Al B. Ferrer and from 1969 to date for Roberta Ferrer. The awards are as follows:

Al B. Ferrer	$3,200.00
Roberta Ferrer	2,500.00

FONTECCHIO. The residence location was 7401 West 93rd Place. The period for which damages are awarded is from 1967 to 1972. The award to Nicholas A. Fontecchio is in the sum of $3,000.00.

GAUL. The residence locations are two in number: 8555 Trouville Avenue in Playa Del Rey and 9333 Kellyfield Avenue in Westchester. The period for which damages are awarded cover a one-year period at the Trouville Avenue location during 1967-1968 and a five-year period at the Kellyfield Avenue location from 1968 to 1973. The awards are as follows:

Edward R. Gaul		$2,500.00
Alice Gaul		1,500.00
Darlene Gaul Tydlaska		1,500.00
Darryl Gaul	-	No Recovery
Lynette Gaul Vesco	-	No Recovery

HEAP. The residence location is 8820 Lilienthal Avenue. The period for which damages are awarded is from 1967 to date. The awards are as follows:

George Heap	$3,200.00
Willie Heap	4,200.00

HEHN. The residence location was 9187 Ingleport Avenue. The period for which damages are awarded is from 1967 to 1973. The awards are as follows:

Sidney Hehn	$3,500.00
Doreen Hehn	3,500.00

LEMON. The residence location is 8712 Lilienthal Avenue. The period for which damages are awarded is from 1967 to date. The awards are as follows:

Richard Lemon	$3,000.00
Eleanor Lemon	3,000.00
Robert Lemon	900.00
James Lemon	900.00

MEYERS. The residence location was 9400 Belford Avenue. The period for which damages are awarded is from 1967 to 1971. The awards are as follows:

Harry Meyers	$1,600.00
Julia Meyers	2,500.00

RUTHS. The residence location is 9037 Fleetwing Avenue. The period for which damages are awarded is from 1967 to date. The awards are as follows:

Lois Ruths	$4,500.00
Kathy Ruths	4,500.00

STINE. The residence location is 7361 West 93rd Place. The period for which damages are awarded is from 1967 to date. The awards are as follows:

Russell W. Stine	$3,200.00
Margaret S. Stine	4,200.00

VON WERDER. The residence location is 9147 Goebel Avenue. The period for which damages are awarded covers approximately ten months during 1967-1968. The awards are as follows:

Gerald Von Werder	$ 600.00
Margarita Von Werder	600.00
Robert Von Werder	300.00
Gerald Von Werder, Jr.	300.00
Danny Von Werder	300.00

WHITE. The residence location was 9163 Ingleport Avenue. The period for which damages are awarded is from 1967 to 1972. The awards are as follows:

Duane White	$2,000.00
Mary Lou White	2,000.00

The Dudzinski family, as to whom no award of damages is made because of the court's finding that jet aircraft noise at the location, 8359 Kenyon Avenue, does not constitute a nuisance, includes the following members: Tadenz, Witold, Bogdan, Magali and Christianne.

The parties have stipulated in this case at bench that each homeowner plaintiff who was seeking damages for personal injury and mental and emotional distress caused by jet aircraft noise has received an award through trial or has made a settlement with defendant city with respect to his claim for damage to his

residential property based on a reduction in its market value.

Evidence was introduced on behalf of all persons to whom an award of damages has been granted for personal injury and mental and emotional distress. It appears, however, that some of these persons may not have been listed properly as plaintiffs in the First Amended Complaint which formed the basis for the second phase of this trial. The court, therefore, orders that the First Amended Complaint shall be amended to add by interlineation on page 102 thereof, lines 10 to 32, the names of those persons as to whom recovery is permitted or denied by this Memorandum Opinion and who may not be set forth in said First Amended Complaint by such names as plaintiffs.

During the course of this litigation, numerous plaintiffs and the defendant City were able to reach settlements of such plaintiffs' claims for damages for physical injury and mental and emotional distress alleged to have been suffered as a result of noise from jet aircraft using the North Runways. The claims of 50 plaintiffs remained the subject of trial and determination by this court.

The awards for physical injury and mental and emotional distress being made herein total $86,800.00. These awards are granted to 41 plaintiffs who make up 15 families. The nine plaintiffs as to whom no awards are granted consist of one family of five and four minors from three families to whom awards are granted to other members thereof.

Dated this 30th day of September, 1975.

BERNARD S. JEFFERSON
Judge of the Superior Court

APPENDIX "D."

Federal Aviation Act of 1958.
49 U.S.C., 1301 et seq.

Provisions Involved:

[49 U.S. Code 1304]. "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

[49 U.S. Code 1348]. "(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest."

"(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

[49 U.S.C. 1431]. (a) For purposes of this section:

(1) The term "FAA" means Administrator of the Federal Aviation Administration.

(2) The term "EPA" means the Administrator of the Environmental Protection Agency.

(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

(2) The FAA shall not issue an original type certificate under section 608(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d).

(c)(1) Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regulations to provide such control and abatement of

aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, which publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within ninety (90) days after the conclusion of such hearing and after consultation with the EPA, the FAA shall—

(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations and a detailed analysis of and response to all documentation or other information submitted by the Environmental Agency with such proposed regulations.

(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare

from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 102(2)(C), the report of the FAA indicated that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was

made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

(d) In prescribing and amending standards and regulations under this section, the FAA shall—

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 609, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the

order of the FAA if it finds that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

APPENDIX "E."

Airport and Airway Development Act of 1970.
49 U.S. Code 1701 et seq.

Provisions Involved:

"The Congress hereby finds and declares—

"That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

"That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense.

"That the annual obligational authority during the period July 1, 1970, through September 30, 1980, for the acquisition, establishment, and improvement of air navigational facilities under the Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.), should be no less than $250,000,000."

APPENDIX "F."

Noise Control Act of 1972.
PL 92-574.

Provisions Involved:

"Sec. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b) (1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted."

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1406

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,
Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California.

ALVIN G. GREENWALD,
GREENWALD AND GREENWALD,
6300 Wilshire Boulevard,
Los Angeles, Calif. 90048,
(213) 653-3973,

JERROLD A. FADEM,
MICHAEL M. BERGER,
FADEM, BERGER & NORTON,
501 Santa Monica Boulevard,
P.O. Box 2148,
Santa Monica, Calif. 90406,
(213) 451-9951,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1979
No.79-1406

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,
Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California.

The Respondents Greater Westchester Homeowners Association, et al. (hereafter, the Homeowners), forty-one neighbors of Los Angeles International Airport who were awarded damages because of the injurious way in which the City of Los Angeles operates its airport, respectfully request this Court to deny the petition for writ of certiorari.

In applying settled federal law, the California Supreme Court (which unanimously reached the same conclusion as the Superior Court and the Court of Appeal) simply held a tortfeasor accountable for the consequences of its own conduct. The City's petition ignores its own causative role in the Homeowners' injuries. The California Supreme Court did not (see 26 Cal.3d at 98-99). The City's petition also ignores express Congressional preservation of suits such as this (49 U.S.C. §1506).

Question Presented.

(a) Where Congress, the Department of Transportation, the FAA, the CAB and the federal judiciary have repeatedly and consistently declared that airport operators have the power to enact regulations to control noise generated by aircraft using their facilities, and

(b) where Congress expressly says that—notwithstanding its extensive federal regulatory scheme—common law actions may coexist harmoniously with the federal regulations, then

Question: is it proper for a court to determine that an airport operator's failure to properly exercise its noise control power renders the operator liable to its neighbors for damage caused by such failure?

Additional Statutes and Regulations Involved.

The following pertinent statutes and regulations are not cited or quoted in the petition.

49 U.S.C. §1506:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

42 U.S.C. §7604(e):

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

49 U.S.C. §1305(b)(1):

> "Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political

subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights." (Section 105[b][1]; emphasis added.)

14 C.F.R. §36.5:

"Pursuant to 49 U.S.C. 1421(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination was made, under this part, that these noise levels are or should be acceptable for operation at, into, or out of any airport."

Statement of the Case.

The City's factual presentation lacks candor. It fails to present to this Court the factual basis for the California Supreme Court's decision.

This suit seeks to have an airport operator accept the financial responsibility for the consequences of operating its airport in the manner it has chosen.

As the City acknowledges, this Court has established that airport operators are liable for property damage caused by the noise of aircraft in flight. (*Griggs v. Allegheny County* [1962] 369 U.S. 84.) The *Griggs* rule is not directly challenged by the City. But its rationale is *sub silentio* called in question. The airport operator was held liable in *Griggs* because of the operator's choice of location, failure to acquire buffer zones, and similar decisions which combined to cause injury to nearby property.

The City's petition opts for a neutron bomb approach: *i.e.*, the City acknowledges its duty to protect *property*, but feels no responsibility for the *people* who *live* on the property. Every level of California court expressly repudiated

such an "ignore the people" approach (26 Cal.3d at 98). It is no more persuasive this fourth time around.

The City does not challenge the sufficiency of the evidence to sustain the judgment. That evidence demonstrated the anguish suffered by the Homeowners because of the way in which the City conducts its airport operations.

The trial court summed up the evidence as follows:

> "The testimony of the plaintiffs as to the effects suffered by them from the aircraft noise . . . established that the jet aircraft noise interfered with person-to-person conversation in the home, with the ability to engage in normal telephonic communication, with the ability to enjoy the use of the out-of-doors' portion of their property and with the ability to hear and enjoy television programs; that such noise caused frequent arousal from sleep and, in some cases, interfered with the ability to engage in or to enjoy sexual relations. With respect to family members of school age, the testimony was to the effect that the jet aircraft noise interfered with the ability to study in the home." (Pet., App. C, p. 59).
>
> "The defendant City's acts of permitting jet aircraft to use the runways of the Los Angeles International Airport and emit the kind of noise which is injurious to health or offensive to the senses so as to interfere with plaintiffs' comfortable enjoyment of their homes constitute a method and manner of operating said Airport that creates a nuisance for which the defendant City becomes liable in damages." (Pet., App. C, p. 42).

Omitted entirely from the City's factual statement is a discussion of the acts of the City which caused the Home-

owners' injuries. Instead, the City prefers to place the blame on ". . . aircraft in flight . . ." (Pet. 1, 2, 8, 12).

A fair presentation of the facts would have explained the City's active participation in the Homeowners' injury. This is discussed by the California Supreme Court, 26 Cal.3d at 98-99. Suffice it to note at this point that it was the City (not the pilots, the airlines or any other government agency) that chose where to locate the airport, designed the airport, decided on the location and direction of the runways, decided how much neighboring property to acquire as a buffer area, refused to institute noise control procedures and assiduously sought huge federal grants to expand its number of jet operations without thought about the impact of the increased use on its neighbors.

Although the airlines and aircraft using the airport possess various certificates from the FAA and the CAB, *none* of these certificates either authorizes or requires their use in local situations where they may cause injury. Indeed, such authorization is *expressly disclaimed*. *E.g.*, while the FAA certifies aircraft for use, its regulations warn:

> "Pursuant to 49 U.S.C. 1421(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. *No determination was made, under this part, that these noise levels are or should be acceptable for operation at, into, or out of any airport.*" (14 C.F.R. §36.5; emphasis added.)

Contrary to what one would conclude from the City's factual presentation, this suit asks the City to account for *its own* actions.

That is all the judgment does.

REASONS WHY THE WRIT SHOULD BE DENIED.

1

Damage Actions Are Not "Federally Pre-empted". Federal Statutes Expressly Authorize the Type of Common Law Action at Bench.

The City's assertion that the Homeowners' damages are somehow "federally pre-empted" is puzzling. The federal statutes dealing with aviation demonstrate the contrary.

Determining congressional *intent* to pre-empt or not preempt is fundamental. It is *intent* which this Court has repeatedly held to be determinative.

In *Schwartz v. Texas* (1952) 344 U.S. 199, 202, 203, this Court stated:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a *clear manifestation of intention* to do so. The exercise of federal supremacy is not lightly to be presumed.
>
> "The principle thus applicable has been frequently stated. It is that the *Congress may* circumscribe its regulation and *occupy a limited field,* and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State. [citations]" (Emphasis added.)

Well, then, what's the situation at bench? Did Congress intend a *total* pre-emption? Or, was its goal more limited?

Congress has enacted four groups of statutes regulating aviation. Each of them preserves damage actions.

The Federal Aviation Act of 1958, 49 U.S.C. §§1301-1542 is the most pervasive. It occupies chapter 20 of Title 49 of the United States Code, and governs the CAB as well as the FAA, and economic as well as safety and noise regulation of civil aviation.

Notwithstanding this extensive regulation, 49 U.S.C. §1506 expressly *permits* common law suits such as the Homeowners':

> "*Nothing* contained in this chapter shall *in any way* abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (Emphasis added.)

The Airport and Airway Development Act of 1970 (49 U.S.C. §§1701-1742) has been held expressly enforceable by airport neighbors in suits against airport operators. *City of Inglewood v. City of Los Angeles* (9th Cir. 1971) 451 F.2d 948, 955-956. See also *Miree v. Dekalb County* (1977) 433 U.S. 25.

The Clean Air Amendments of 1970 also expressly permit suits by private citizens (42 U.S.C. §7604[e]):

> "*Nothing* in this section shall restrict *any right* which *any person* (or class of persons) may have under any statute or *common law* to seek enforcement of any emission standard or limitation or to seek any other relief (including relief *against* the Administrator or a *State agency*)." (Emphasis added.)

This is relevant because a jet's black trail of exhaust emissions, fumes and sooty fallout, are significant parts of the injury to the Homeowners.

The aviation provisions of the Noise Control Act of 1972, 49 U.S.C. §1431, are codified as part of chapter 20 of Title 49 U.S.C. They are thus subject to 49 U.S.C. §1506 quoted above.

Indeed, this Court recently confirmed the propriety of private, common law actions affecting aviation, though subject to exclusive federal (CAB) regulation. See *Nader v. Allegheny Airlines, Inc.* (1976) 426 U.S. 290, 298-300.

Thus, assuming *arguendo* that Congress had an intent that local *regulation* of flights be "pre-empted", private *actions for damages* are permitted for adverse consequences of the regulated (flight) activity.[1]

This Court recently dealt with a similar problem (also arising i California) under the National Labor Relations Act. In *Farmer v. United Brotherhood of Carpenters* (1977) 430 U.S. 290, this Court vacated the judgment of a California Court of Appeal and held that the National Labor Relations Act did *not* pre-empt the right of a union member to sue a union for tort in state court. In upholding the individual's right to maintain common law, state court suits in a Federally regulated area, this Court emphasized the state's interest in protecting its citizens from tortious injury, and the concurrent lack of Federal interest in protecting tortious conduct from redress (430 U.S. at 299-303.)[2] (Likewise, see *Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 194-198; *United Construction Workers v. Laburnum Constr. Corp.* (1954) 347 U.S. 656, 663-664.)

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[1]In *Luedtke v. County of Milwaukee* (E.D. Wis. 1974) 371 F.Supp. 1040, aff'd, (7th Cir. 1975) 521 F.2d 387 (cited in the Petition), the U.S. District Court dismissed the action against the airport operator on the ground that *the state court was the appropriate forum* for trying all claims—including claims for *punitive damages* (see 371 F.Supp. at 1044). That is hardly authority for dismissing a *state court* cause of action. Indeed, it appears to be the contrary.

[2]That is why the City's reliance on *San Diego Bldg. Trades Council v. Garmon* (1959) 359 U.S. 236, is misplaced. *Garmon* dealt with a field almost totally pre-empted. That is not so here. But even in *Garmon's* field (labor relations) this Court has consistently recognized exceptions and permitted common law tort suits. And recall that in the aviation context, there is express recognition of such suits (49 U.S.C. §1506) which is absent in labor law.

The same is true here. California courts have both a Constitutional mandate (Cal. Const., Art.1, §1) and legitimate interest in protecting Californians from tortious injury inflicted by jet noise and air pollution. Likewise, though Congress has sought to foster aviation, it does *not* condone nor require operation of jet airports in such a manner or location that injury is inflicted on their neighbors. Quite the contrary. As discussed below, the position of the Federal government has been consistent and clear: it is the responsibility of each airport operator to ensure that its airport is operated under such local regulations as will avoid injury to nearby people and property—even if that means excluding noisy aircraft.

2

All Branches of the Federal Government—Legislative, Executive and Judicial—Have Repeatedly Re-affirmed the Power of Airport Operators to Control Aircraft Noise.

It is startling that the City's petition seeks to create the impression that the Federal government has so occupied the field that no room is left for airport operators—acting as proprietors—to control what happens at their own facilities. The City is able to so assert only by mis-stating the holding in the authority it *does* cite (*City of Burbank v. Lockheed Air Terminal, Inc.* [1973] 411 U.S. 624), [3] and by omitting *any* but the most oblique reference[4] to the continuous state-

---

[3] *Burbank* involved police power regulation by the city in which an airport was located. It did *not* involve the power of an airport proprietor.

[4] See Pet. 14 where, without noting the conflict with the sweeping generalities presented elsewhere in the petition, the City says:

> "Petitioner is not unmindful of the progeny of *Burbank*, which recognize the power of an airport proprietor to impose reasonable and nondiscriminatory airport use restrictions which do not create a burden on interstate commerce."

Candor would seem to call for a discussion of—or at least a citation to—". . . the progeny of *Burbank* . . ."

ments to the contrary by the federal judiciary, Congress, the Department of Transportation, the FAA and the CAB. The California Supreme Court was not taken in by the City's evasion-of-contrary-authority ploy. The decision below simply applies settled federal law.

First. While attempting to provide federal impetus to control noise, Congress has consistently recognized the role of local government.

The Noise Control Act of 1972 provides:

> "(3) that, while *primary responsibility for control of noise rests with State and local governments*, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment." (42 U.S.C. §4901[a][3]; emphasis added.)

With respect to aircraft noise, the federal role has been to establish certification standards for types of aircraft (Federal Aviation Regulations, part 36). But these FAA standards—on their face—authorize *more stringent regulation by airport operators:*

> "Pursuant to 49 U.S.C. 1421(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. *No determination was made, under this part, that these noise levels are or should be acceptable for operation at, into, or out of any airport.*" (14 C.F.R. §36.5; emphasis added.)

Moreover, the Airline Deregulation Act of 1978 provides:

> "*Nothing* in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States *as the owner*

> *or operator of an airport* served by any air carrier certificated by the Board *to exercise its proprietary powers and rights.*" (49 U.S.C. §1305[b][1]; emphasis added.)

The CAB reads this section as preserving the proprietary rights historically enjoyed by airport operators. In its initial statement of policy under the Act (Feb. 7, 1979), the CAB said:

> ". . . State and local authorities may continue to exercise their proprietary powers and rights as owners or operators of airports served by federally certificated air carriers." (44 Fed. Reg. 9949.)
>
> "Finally, we conclude that Congress has not changed the *status quo* with respect to the rights and powers of local governments to take certain actions in their capacity as airport owners and proprietors under case law. See, *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 635, n.14 (1973)." (44 Fed. Reg. 9951.)

Congress has recognized the proprietary power of airport operators to control noise, and the CAB and FAA acknowledge that power.

Second. The Courts have confirmed this power. In the Concorde controversy, the Second Circuit Court of Appeals put it this way:

> "*The task of protecting the local population from airport noise, however, has fallen to the agency, usually of local government, that owns and operates the airfield. Air Transport Ass'n v. Crotti,* 389 F.Supp. 58 [ND Cal. 1975] (three judge court); *National Aviation v. City of Hayward,* 418 F.Supp. 417 (ND Cal. 1976). It seemed fair to assume that the proprietor's intimate knowledge of local conditions, as well as his

> ability to acquire property and air easements and assure compatible land use, *cf. Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed. 585 (1962), would result in a rational weighing of the costs and benefits of proposed service. Congress has consistently reaffirmed its commitment to this two-tiered scheme, and both the Supreme Court and executive branch have recognized the important role of the airport proprietor in developing noise abatement programs consonant with local conditions." (*British Airways Bd. v. Port Authority* [2d Cir. 1977] 564 F.2d 1002, 1010-1011; emphasis added.)

In what has become a famous footnote, this Court approvingly quoted some legislative history in *City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624, 635, fn. 14:

> "The letter from the Secretary of Transportation also expressed the view that the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise* which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently *deny the use of their airports* to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory . . . This portion as well was quoted with approval in the Senate Report." (Emphasis added.)

The *Burbank* rule has been applied repeatedly by the federal courts.[5] *E.g., in National Aviation v. City of Hayward* (N.D. Cal. 1976) 418 F.Supp. 417, 424:

---

[5]In addition to the cases quoted in the text, see *British Airways Bd. v. Port Authority* (2d Cir.1977) 558 F.2d 75, 81-82; *City of Blue Ash v. McLucas* (6th Cir. 1979) 596 F.2d 709, 712; *cf. Port of New York Authority v. Eastern Air Lines, Inc.* (E.D. N.Y. 1966) 259 F.Supp. 745, 751-752.

"Accordingly, while the Congressional purpose was undoubtedly clear enough to the *Burbank* majority to rule that a municipality's police power regulations regarding aircraft noise at an airport, *which it was not the proprietor of*, invaded an area exclusively reserved for federal control, this court cannot, in light of the clear Congressional statement that the amendments to the Federal Aviation Act were not designed to and would *not 'prevent airport proprietors from excluding any aircraft on the basis of noise considerations,'* make the same finding with respect to regulations adopted *by municipal airport proprietors*." (418 F.Supp. at 424; emphasis added; footnotes omitted.)

A three judge District Court explained it this way:

"It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative. . . . *That correlating right of proprietorship control is recognized and exempted form judicially declared preemption by footnote 14.*" (*Air Transport Assn. v. Crotti* [N.D. Cal. 1975] 389 F.Supp. 58, 63-64 emphasis added.)

Another court aptly summed it up:

"The courts recognize that an airport proprietor may restrict the use of its facilities on the basis of noise considerations without running afoul of the preemption doctrine. [Citations]" (*San Diego Unified Port Dist. v. Gianturco* [S.D. Cal. 1975] 457 F.Supp. 283, 291.)

The federal judiciary has thus repeatedly and unequivocally confirmed the power of airport proprietors.

Finally. The executive branch has repeatedly acknowledged the scope of proprietor power. As the FAA summed it up in June, 1978:

> "Congress has the power under the Constitution to regulate the operations of airports for noise abatement purposes, but it has chosen not to do so. *This congressional policy leaves airport proprietors responsible for the regulation of their airports for noise abatement purposes*. The proprietors may issue noise-related airport use restrictions that are not unjustly discriminatory and do not impose an undue burden on interstate or foreign commerce. The Chicago Convention and bilateral air services agreements do not alter this basic feature of American aviation law." (43 Fed. Reg. 28417; emphasis added.)
>
> "This recognition of the unique capacity and responsibility of the airport proprietor to effect a 'rational weighing of the costs and benefits of proposed service' is the foundation of the 'local option' policy underlying FAA noise abatement rulemaking since part 36 was originally issued in 1969." (43 Fed. Reg. 28417.)

This recent statement confirmed a November, 1976 FAA policy decision (FAA, *Aviation Noise Abatement Policy* [Nov. 18, 1976]):

> "Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. *We have* been urged to undertake—and have *considered carefully and rejected—full and complete federal preemption of the field of aviation noise abatement*. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users,

and governments.'' (p. 34; emphasis added.)

''The primary obligation to address the airport noise problem always has been and remains a local responsibility.'' (p. 2)

In 1975, the *Crotti* court quoted the FAA as follows (389 F.Supp. at 64):

> ''The preamble to 14 C.F.R., Part 36, emphasizes that *local air proprietors have the responsibility for determining the permissible noise levels for aircraft using their airport:*
>
> '''Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is ''acceptable,'' from a noise standpoint, in particular airport environments. *Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport.* The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those *more restrictive limits determined to be necessary by individual airport proprietors* in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce'; . . .'' (Emphasis added.)

In 1973, this Court—in *Burbank*—quoted a letter from the Secretary of Transportation (the FAA is within the Department of Transportation). The letter had been approvingly quoted in House and Senate reports (411 U.S. at 635, fn. 14):

> ''the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport,* from issuing regulations or establishing re-

quirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." (Emphasis by the Court.)

This acknowledgment has consistently been made by the executive branch in litigation.

For example, in the Concorde litigation, the Court of Appeals said:

> "In response to our request, the United States filed an *amicus* brief in which it urged that Secretary Coleman's order was never intended to deprive the Port Authority of the right to condition utilization of the facilities at JFK on the Concorde's compliance with reasonable noise regulations. *The Government,* indeed, went further, and *denied that existing legislation authorized the Executive under any circumstances to preempt airport proprietors from promulgating their own noise regulations.*
>
> "This conclusive statement of the United States position confirms our independent assessment of the public record." (*British Airways Bd. v. Port Authority* [2d Cir. 1977] 558 F.2d 75, 81-82; emphasis added.)

In short, the legislative, executive and judicial branches of the federal government have repeatedly and consistently acknowledged the regulatory power of airport proprietors.

The California courts imposed liability because of the City's mis-use and non-use of its own power. Contrary to the City's petition, *that* is what this case is all about. It has nothing to do with anyone other than the City "regulating"

the airport. The City has been held accountable for the way it has used and abused its power. Courts have done that for centuries.

Conclusjon.

Factually, the petition ignores the City's active participation in the Homeowners' injury.

Legally, the petition ignores most of the pertinent authorities, and either over-simplifies, over-states or mis-states the few authorities it cites.

The California Supreme Court merely held a tortfeasor accountable for its own actions. That is clearly in line with the Congressional design. That is why Congress expressly preserved common law forms of action (49 U.S.C. §1506) at the time it adopted the extensive federal regulatory format. There is no need to disturb the judgment of the California courts. The Respondents pray that the petition be denied.

Respectfully submitted,

ALVIN G. GREENWALD,
DOROTHY THOMPSON,
GREENWALD AND GREENWALD,
JERROLD A. FADEM,
MICHAEL M. BERGER,
FADEM, BERGER & NORTON,
By MICHAEL M. BERGER,
Attorneys for Respondents, Greater Westchester Homeowners Assn., et al.

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Petitioners' Brief in Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California.

BURT PINES,
City Attorney,
JOHN M. WERLICH,
Assistant City Attorney,
1 World Way,
Los Angeles, Calif. 90009,
(213) 646-3260,
Attorneys for Petitioner,
City of Los Angeles.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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The purpose of this brief is to reply to new issues raised in Respondents' Opposition Brief (Rule 22.5).

I.

Respondents Ignore the Controlling Law Found in Burbank.

Respondents have chosen to argue their position in a vacuum. They fail to even consider the controlling law enunciated in *City of Burbank v. Lockheed Air Terminal, Inc.*[1] Apparently, they have forgotten the two most important points enunciated in *Burbank*:

[1]411 U.S. 624, 36 L.Ed.2d 547, 93 S.Ct. 1854 (1973).

"That act [The Noise Control Act of 1972] reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, *preempting state and local control.*" 411 U.S. at 638. (emphasis added).

"[C]ontrol of noise is of course deep seated in the police powers of the states. . . . The pervasive control vested in the EPA and in the FAA under the 1972 Act seems to us to leave no room for local curfews *or other local controls.*" *Id.* at 638. (emphasis added).

Any attempt to impose state nuisance liability upon an airport proprietor must, because of these two principles, fail.

II.

The "Savings Clause" of the Federal Aviation Act of 1958 (49 U.S.C. §1506) Has Not Been and Cannot Be Interpreted in a Manner Which Would Permit Respondents' Nuisance Action.

Recently, this Court reaffirmed in *Jones v. Rath Packing Co.*, 97 S.Ct. 1305 (1977), that where Congress has " 'unmistakably . . . ordained' " that its enactments are to be the sole regulation of an area of commerce, state laws regulating that aspect of commerce are unconstitutional and impermissible. *Id.* at 1309. While this result may be compelled by an express Congressional command explicitly stated in the language of the statute, *Jones* recognizes that the Congressional command of preemption may also be "implicitly contained in [the statute's] structure and purpose." *Id.* (Citing to *Burbank*). Under these circumstances, the issue then becomes whether or not the state's " 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.*

After an extensive review of the legislative history of the relevant statutes this Court concluded in *Burbank* that Congress had preempted the field of airport noise control. 411 U.S. at 633. The Congressional goals and objectives identified in that process included the need for a centralized federal authority to maintain the "delicate balance" between airspace safety and efficiency, protection of persons on the ground, as well as the control of noise pollution. *Id.* at 638-639. The Court reaffirmed that local governmental entities cannot regulate in this area so long as the Congress requires federally directed uniformity. Quoting part of the legislative history of relevant amendments to the Federal Aviation Act, the Court noted:

> " 'The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves *controlling the flight of aircraft*. . . . HR 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. *State* and local governments will remain unable to use their police powers to control aircraft noise by.' " 411 U.S. at 635 (emphasis added).

Respondents seek to escape the inevitable conclusion that the recovery of nuisance damages under State law is tantamount to local regulation of aircraft in flight. In doing so, they rely upon the "savings clause" of the Federal Aviation Act of 1958 (49 U.S.C. §1506).

One commentator, analyzing savings clause arguments on federal preemption questions, has characterized them as "makeweight arguments" and has suggested that "neither the presence nor the absence of a savings or exclusiveness provision is alone sufficient to resolve a pre-emption question." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction,* 12 Stan.L.Rev. 208, 214-215

(1959). Savings clauses are always interpreted in the context of the more specific provisions of the regulated legislation.

In *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), this Court held that the Congressional purpose underlying the Interstate Commerce Act was to eliminate discrimination by creating uniform shipping rates regulated by the Interstate Commerce Commission. 204 U.S. at 439. Given that purpose, the Court held that a savings clause in the Act, *identical to that present in the Federal Aviation Act*, would not permit a private damage action attacking the reasonableness of rates which were subject to the jurisdiction of the federal agency (204 U.S. at 446-447) because, the Court concluded, "the act cannot be held to destroy itself." *Id.* at 446.

The courts have applied the reasoning of *Abilene* to other private damage actions relying upon the presence of a savings clause. In *Danna v. Air France*, 334 F.Supp. 52 (S.D.N.Y. 1971), aff'd, 463 F.2d 407 (2d Cir. 1972), members of a purported class alleged that numerous airlines maintained a "Youth Fare" ticket pricing structure which discriminated against persons older than twenty-five years in violation of Section 404(b) of the Federal Aviation Act (49 U.S.C. §1374(b)). The court held that the issue of discriminatory rates was not a proper subject for judicial inquiry and dismissed the action under the doctrine of primary jurisdiction (of the Civil Aeronautics Board).[2] Ex-

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[2]Respondents suggest that a similar case, *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) authorized "common law actions affecting aviation though subject to exclusive federal (CAB) regulation." Respondents' Brief at 8. *Nader* was basically a primary jurisdiction case. Its holding regarding the savings clause was premised upon the fact that the CAB had not, to that point, regulated in the area of airline "overbooking" (426 U.S. at 297 n.8), and that the particular language of Section 411 of the Act did not carry with it the "power to immunize". 426 U.S. at 301. Under those circumstances, the Court determined that

amining the very "savings clause" (49 U.S.C. §1506) upon which respondents rely, the court concluded:

> "It is not likely that the Congress would legislate a scheme under Federal agency aegis, aiming at uniformity, and at the same time permit the survival of State common law rights inconsistent therewith. That was the holding in Texas & Pac. Ry. v. Abilene Cotton Oil Co., *supra* where it was determined that a shipper could not sue a railroad carrier for an allegedly unreasonable charge based on filed tariffs, because the common law right was extinguished, as absolutely inconsistent with the scheme of the Interstate Commerce Act. It should be noted that the 'saving' provision in the ICA as it then stood was virtually *in haec verba* the language later adopted by the Congress in the 'saving clause' of the Federal Aviation Act of 1958. *It is clear, therefore, that the Act of 1958 had engrafted on to it, at least presumptively, the gloss of Abilene with which the Congress was familiar.*" 334 F.Supp. at 59 (emphasis added).

See also *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 474 (1959) (this Court will not assume that the Congress was unaware of *Abilene, supra*, in drafting a similar "savings clause").

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a private damage action for overbooking would not require the trial court to "substitute its judgment" for that of the CAB. 426 U.S. at 299-300.

Nader is, therefore, readily distinguishable from the circumstances here since: (1) the FAA has adopted extensive regulations regarding aircraft in flight—including regulations adopted for noise abatement purposes; and therefore, (2) respondents' nuisance counts would require the trial court in this case to "substitute its judgment" for that of FAA regarding the regulation of aircraft in flight for noise abatement purposes.

Further, this Court, the District Court[3] and the Ninth Circuit Court of Appeals all agreed in *Burbank* that there had been a Congressional intent, as in *Abilene*, to impose a *uniform* scheme of federal regulation. Each court also concluded that the savings clause of the Federal Aviation Act could not be interpreted in a way which would frustrate the otherwise expressly stated Congressional objectives and goals in the Federal Aviation Act and related airport noise legislation. In its opinion in *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667 (9th Cir. 1972), the United States Court of Appeals for the Ninth Circuit stated:

> "The State also points out that the Federal Aviation Act contains a 'saving clause,' 49 U.S.C. §1506, a reservation of common law and statutory remedies, indicating that Congress did not intend to preempt state and local regulatory authority.
>
> 'Of course such a general provision does not resolve specific problems, *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 671, n.22 [83 S.Ct. 984, 991, 10 L.Ed.2d 52], but its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable.' *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 444, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963) (concurring opinion).
>
> "In this case, we have found the conclusion of federal preemption 'unavoidable.' Furthermore, the Federal Aviation Act also contains language of exclusivity. 49 U.S.C. §1508 declares that the United States possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States.

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[3](*Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F.Supp. 914 (C.D. Cal. 1970)).

> . . .' That is the same type of expression which the Supreme Court found in the Federal Tobacco Inspection Act to evidence Congressional intent to establish a wholly federal system which States were powerless even to supplement. Campbell v. Hussey, 368 U.S. 207, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961)." 457 F.2d at 675.

In this Court's opinion in *Burbank*, it was the exclusivity language of 49 U.S.C. §1508 which was found to be of paramount importance. 411 U.S. at 626-627.

The true thrust of respondents' argument in this regard is summarized at page 8 of their Brief where they state: "Thus, assuming *arguendo* that Congress had an intent that local *regulation* be 'pre-empted', private *actions for damages* are permitted for any adverse consequences of the regulated activity." (Petitioner's emphasis). The inherent sophistry of this argument was recognized long ago in the often quoted opinion by Judge Dooling in *American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017. In that case, Judge Dooling noted:

> "Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic [citations omitted]." 272 F.Supp. at 235.

Regulation of the "consequence" is regulation of the cause. If individual state courts are permitted to place the intricate system of federal regulation of aviation under local control by adjudicating the "reasonableness" of aircraft

flight operations, and then to place their policy determinations into effect through the award of money damages, the Congressional objective of a uniform and exclusive system of federal control of aircraft for noise abatement purposes will not only be frustrated, it will be defeated. The savings clause of the Federal Aviation Act cannot be applied in a way which would preclude accomplishment of the Congressional objective of a uniform federal solution to the national airport noise problem.

III.

Respondents Misstate and Misrepresent the Holding of the Seventh Circuit in Luedtke v. County of Milwaukee.

Respondents state, (Respondents' Brief at 8, footnote 1), that the U.S. District Court, in *Luedtke*[4] dismissed the action against the airport operator on the ground that the state court was the appropriate forum for trying *all* claims. Such a statement is inaccurate in that respondents neglect to mention that the District Court was referring only to the inverse condemnation portion of the suit, not to the nuisance claim. The United States Court of Appeal addressed this precise issue in affirming the District Court's decision:

> "The District Court held that *even if it were to consider* these allegations, . . . the plaintiffs action on these counts could not be maintained. We agree.
>
> "Since the federal laws and regulations have preempted local control of aircraft flights, *Burbank, supra*, the *Defendants may not, to the extent they comply with such federal laws and regulations, be charged*

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[4]371 F.Supp. 1040 (E.D. Wis. 1974), aff'd. 521 F.2d 387 (7th Cir. 1975).

with negligence or creating a nuisance." 521 F.2d at 391. (Emphasis added.)

Respectfully submitted,

BURT PINES,
City Attorney,

JOHN M. WERLICH,
Assistant City Attorney,

Attorneys for Petitioner,
City of Los Angeles.

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BURT PINES,
City Attorney,
JOHN M. WERLICH,
Assistant City Attorney,
1 World Way,
Los Angeles, Calif. 90009,
(213) 646-3260,
Attorneys for Petitioner, City of Los Angeles.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Petitioner, City of Los Angeles, is mindful that this Court frequently invites the Solicitor General to submit views prior to the Court's decision to grant or deny certiorari because the Government often brings an "important and sophisticated analysis"[1] to cases of constitutional import. In this instance, however, the amicus memorandum on behalf of the United States incorrectly characterizes the basis for the City's Petition for Certiorari.

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[1]*Government Litigation in the Supreme Court: The Roles of the Solicitor General,* 78 Yale L.J. 1480 (1969).

1. Contrary to the Solicitor General's suggestion, Petitioner is *NOT* urging that an airport proprietor is powerless to impose airport use restrictions and is, for that reason, immune from state imposed nuisance liability. Petitioner recognizes its power to impose reasonable, nondiscriminatory use restrictions which do not place an undue burden on interstate commerce. But, whether an airport proprietor has such a power is not relevant to the issue now before this court.

The issue is, rather, may the courts of the State of California regulate an airport by imposing nuisance liability on an airport proprietor for noise created by aircraft in flight? *Burbank*[2] held that Congress preempted a *non*-airport proprietor, the City of Burbank, from regulating an airport. Yet, the State of California is in the same position as the City of Burbank; both are *non*-airport proprietors. Regulation may take different forms. The City of Burbank attempted to regulate airports by imposing a nighttime curfew. The State of California through its court-system, is attempting to regulate by imposing tort liability on an airport proprietor through a nuisance statute. As stated in *Garmon,*[3] such an imposition of tort liability is a form of regulation.

2. As pointed out in the original Petition for Certiorari, *Luedtke's*[4] analysis of *Burbank* is diametrically opposed to that of the California Supreme Court in *Greater Westchester*. The Solicitor General dismisses this conflict by criticizing the Seventh Circuit's analysis in *Luedtke* as being "truncated". Further, no attempt is made to explain or analyze the conflict between *Greater Westchester* and

---

[2]*City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

[3]*San Diego Building Trades Council v. Garmon*, 359 U.S. 236(1959).

[4]*Luedtke v. County of Milwaukee*, 521 F. 2d 387 (7th Cir. 1975).

Luedtke. Petitioner is unaware of any published decisions following either *Luedtke* or *Greater Westchester*. However, several recent unpublished decisions from the Georgia courts have refused to follow the reasoning of *Greater Westchester* adopting instead the rationale of *Luedtke*.[5]

3. The Solicitor General opines that this Court's ruling in *Griggs v. Allegheny County*[6] necessitates a ruling that an airport proprietor "is liable for torts as well as for takings." Such position fails to recognize the distinction between liability imposed by the Fourteenth Amendment for a taking of property (*Griggs*), and that imposed by state statute (*Greater Westchester*). In *Greater Westchester* an airport proprietor was mandated *legislatively* to pay nuisance damages. Congress could not have preempted, and thus prevented, the award of "taking" damages in *Griggs*, because Congress alone cannot override a constitutional mandate. However, Congress can, and has, in the interest of a uniform national transportation system, preempted the State of California, and its courts, both *non*-airport proprietors, from regulating an airport proprietor through the vehicle of a *legislatively* enacted and *judicially* enforced nuisance statute.

CONCLUSION.

Petitioner has come before this Court to advocate the preservation of an approach to noise regulation which is national in scope and uniform in effect. *Greater Westchester* represents a change in direction which, in the absence of a resolution by this Court, will foster a multitude of con-

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[5]See, e.g., *Owens et al. v. City of Atlanta*, No. C-31533, (Fulton County Superior Court, Georgia, filed March 28, 1980), see Appendix A.

[6]*Griggs v. Allegheny County*, 369 U.S. 84 (1962).

flicting decisions resulting in diversity rather than uniformity and divisiveness rather than cooperation.

Respectfully submitted,

BURT PINES,
City Attorney,
JOHN M. WERLICH,
Assistant City Attorney,
Attorneys for Petitioner,
City of Los Angeles.

APPENDIX A.

Order.

In the Superior Court of Fulton County, State of Georgia.

Wes Owen, et al., Plaintiffs, vs. City of Atlanta, Defendant. Civil Action File No. C-31533.

Joe Moses, et al., Plaintiffs, vs. City of Atlanta, Defendant. Civil Action File No. C-31534.

Avis Crutchfield, et al., Plaintiffs, vs. City of Atlanta, Defendant. Civil Action File No. C-31535.

The Motion for Partial Summary Judgment, filed by the defendant, having come on regularly to be heard and having heard argument of counsel and having read and considered briefs and the entire record, the Court enters the following ORDER:

1. The plaintiffs here are homeowners and residents of College Park, Georgia, who live within a close proximity to the runways and taxiways of the Atlanta Airport.

The complaint alleges in Count I that aircraft making their approaches to the airport pass over the property of the plaintiffs approximately sixty per cent of the time, thus constantly invading and trespassing upon the airspace of the plaintiffs. The plaintiffs charge that the noise, smoke, raw fuel, and noxious odors emitted by the low-flying aircraft severely and substantially interfere with the residential use and beneficial enjoyment of ownership of the plaintiffs' property.

Count II of the complaint alleges that said emissions have caused a serious detrimental effect upon the lives and health of the plaintiffs and their families.

Count III alleges that said flights interfere with the use of the plaintiffs' property for residential purposes and constitute a trespass upon the plaintiffs' property.

Count IV alleges that the plaintiffs have suffered physical damages to their property caused by vibrations, air pressure waves, and corrosive pollutants.

2. The defendant, City of Atlanta, has moved for partial summary judgment on the ground that no genuine issues of material fact exist as to the plaintiffs' claims based upon nuisance and trespass from over-flight of aircraft.

The plaintiffs rely upon the recent case of *Greater Westchester Homeowner's Ass'n. v. City of Los Angeles,* 160 Cal.Rptr. 733 (1979). This case held that a municipality which owns and operates an airport is liable on a nuisance theory for personal injuries sustained by nearby residents caused by noise from aircraft using the facility.

The Supreme Court of the United States in *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624, considered a local ordinance which prohibited jet aircraft from taking off from the airport between the hours of 11:00 p.m. and 7:00 a.m. Mr. Justice Douglas writing for the Court, held that the Federal Aviation Act and Noise Control Act had pre-empted state and local control over aircraft noise. Federal Aviation Act of 1958, 49 U.S.C.A. §1301 *et seq.;* Noise Control Act of 1972, 86 Stat. 1234. The Noise Control Act, by definition, includes the sonic boom.

The U.S. Court of Appeals for the Seventh Circuit in *Luedtke v. County of Milwaukee,* 521 F.2d 387 (1975), noted that in the area of aircraft emissions, Congress had also preempted the field. *Washington v. General Motors Corp.,* 406 U.S. 109 (1972); *Virginians for Dulles v. Volpe,* 344 F.Supp. 573 (E.D. Va. 1972). The Court in *Luedtke* concluded:

> Since the federal laws and regulations have pre-empted local control of aircraft flights, *Burbank, supra,* the defendants may not, to the extent they comply with

> federal laws and regulations, be charged with negligence or creating a nuisance. *Id.* at 391.

In *Luedtke*, as in the case at bar, the plaintiff sought damages for operation of a nuisance.

The California Supreme Court in *Greater Westchester, supra*, made no effort to distinguish *Luedtke*, and attempted to distinguish *Burbank, supra* on the ground that it "refrained from imposing similar limitations on the rights and obligations of a proprietor-landlord to control aircraft noise levels."

Nor did the court in *Greater Westchester* overrule *San Diego Unified School District v. Superior Court for the County of San Diego and Roger A. Britt, et al.*, 67 Cal.Rptr. 557 (1977), *cert. den.*, 434 U.S. 1310 (1978). In *San Diego*, a group of homeowners brought an action based on nuisance, trespass and negligence for recovery of damages caused by aircraft flying to and from the airport. Relying upon *Luedtke*, the court said:

> ". . . In our view, civil damages for the noxious by-products of aircraft in flight . . ., are a form of state regulation in an area which must remain free of such regulation if national air safety, traffic and noise policy are to be left unhampered . . . We conclude that plaintiffs may not recover tort damages for harm caused by aircraft in flight.

While these cases are not controlling, the Court finds their logic compelling. To allow tort damages for nuisance and trespass, as alleged in the complaint would be to hold municipalities liable for the consequences of acts over which control has been pre-empted by the federal government.

As was pointed out by Mr. Justice Jackson in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They

> move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls.

The Supreme Court in *Burbank* concluded by recognizing that "fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded." *Burbank, supra,* at 1862.

Finally, the Court notes that the Georgia cases[1] that have addressed the issue of the liability of airports under theories of nuisance or trespass had been decided before the development of the pre-emption doctrine in this area.

3. For the above reasons, the Motion for Partial Summary Judgment, filed by the defendant, is hereby granted, and judgment entered in favor of the defendant as to Counts II, III, and IV of the complaint.

Let it be so ORDERED.

This 28th day of MARCH, 1980.

/s/JOEL J. FRYER
Judge, Fulton Superior Court, A.J.C.

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[1]*Thrasher v. Atlanta,* 178 Ga. 514; *Delta Air Corp. v. Kersey,* 193 Ga. 862; *Scott v. Dudley,* 214 Ga. 565; *Dyer v. Atlanta,* 219 Ga. 538; *City of Atlanta v. Donald,* 221 Ga. 135; *Chronister v. Atlanta,* 99 Ga. App. 447.

cc: Ferrin Y. Mathews, Esq.
J. M. Hanis, Jr., Esq.
Irmina Rivero Owens, Esq.

Suite 2000
Fulton National Bank Building
Atlanta, Georgia 30303
Gene Burkett, Esq.
P. O. Box 531
Conyers, Georgia 30207

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1406

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,
Respondents.

Amicus Curiae Brief of the Burbank-Glendale-Pasadena Airport Authority in Support of Petition for Writ of Certiorari of the City of Los Angeles.

RICHARD K. SIMON,
KADISON, PFAELZER, WOODARD,
QUINN & ROSSI
707 Wilshire Boulevard, 40th Floor
Los Angeles, California 90017
(213) 688-9000,
Attorneys for the Burbank-Glendale-Pasadena Airport Authority.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Amicus Curiae Brief of the Burbank-Glendale-Pasadena Airport Authority in Support of the Petition for Writ of Certiorari of the City of Los Angeles.

To the Honorable Chief Justice, Warren Burger, and Associate Justices of The Supreme Court of The United States:

The Burbank-Glendale-Pasadena Airport Authority ("Authority"), owner and operator of the Burbank-Glendale-Pasadena Airport ("Burbank Airport"), submits this *amicus curiae* brief in support of the Petition for Writ of Certiorari ("Petition") filed herein by petitioner City of Los Angeles. Appendix A to this brief contains stipulations reflecting the concurrance of all parties to this action in the filing of this brief.

Prefatory Statement.

Burbank Airport is, based on passengers served, the seventh largest airport in the State of California, the fiftieth

largest in the nation, and serves as a base for both interstate and intrastate operations of scheduled commercial carriers as well as non-scheduled, charter and business aircraft and general aviation. Because it is situated within the San Fernando Valley, a largely residential area, this airport has been the subject of a number of lawsuits relating to aircraft noise. Most notably, it was the focus of the seminal decision of this Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Lockheed Air Terminal, Inc., its former owner, is also a defendant in *Abacherle, et al. v. Lockheed Air Terminal, Inc.*, now pending in the Los Angeles Superior Court. In that case, essentially identical to the action at bar, 1,265 individual plaintiffs have asserted nuisance and negligence claims for damages alleged to have resulted from the noise of aircraft using Burbank Airport. The Authority thus has a direct and immediate interest in the decision which gives rise to the Petition of the City of Los Angeles.

For the reasons discussed below, it is the Authority's view that the decision of the California Supreme Court in this action conflicts irreconcilably with this Court's decision in *Burbank, supra*, and with the federal control of aviation and airspace management upon which that decision is premised.

The State of California May Not Exercise Its Police Power to Impose Nuisance Liability for Noise Created By Aircraft in Flight.

The essential issue before this Court is correctly framed by the Petition of the City of Los Angeles: May one arm of the state—the judiciary—impose sanctions in the form of tort liability for the noise which necessarily accompanies aircraft in flight when, under the *Burbank* decision, non-proprietor state and local governments are forbidden from

burdening airport operations with "curfews or other local controls"? *Id.* at 638.

The decision of the California Supreme Court does not address, much less answer, this question.[1] Indeed, its formulation of the holding in *Burbank* reflects a fundamental misunderstanding of that opinion:

> ". . . The *Burbank* opinion strongly suggests that any local noise or use restrictions, by whomever imposed, which substantially upset current air schedules or prevented the use of commercial aircraft which were currently operational would burden to an unacceptable degree both federal aviation policy and interstate commerce." Petition, Appendix A, p. 13.

This Court did not, as the California Supreme Court suggests, propose such a qualified ban on local controls. To the contrary, it held that such controls must be proscribed *because* they would of necessity "upset current air schedules" and otherwise intrude upon the national air transportation scheme created by Congress.

The California Supreme Court's confusion of the rationale of *Burbank* with its result leads inevitably to its erroneous conclusion:

> "We cannot assume that the imposition of liability on a proprietor for personal injury would burden commerce to an appreciably greater degree than that represented by the well accepted, indeed constitutionally compelled, exposure of the proprietor to property damage claims." Petition, Appendix A, p. 17.

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[1]The matter is considered briefly in footnote 2 to the concurring opinion of Chief Justice Bird. Petition, Appendix A, p. 28. The concurring opinion, while perceiving the conflict between this Court's holding in *Burbank* and the holding in this action, misstates the nature of the conflict and misconceives the real effect of parochial jury verdicts on the national air transportation system.

This balancing of the possible consequences of state tort liability against the needs of interstate commerce is a replication of the process already undertaken by this Court in *Burbank*, but with a contrary, and impermissible, result: that state courts may assess nuisance damages against airports for operations which they may neither proscribe nor regulate.

Such a use of the state's police powers was of central concern in *Burbank*. In concluding that the entire scheme of federal regulation of aviation manifested an intent to occupy the field, this Court gave express recognition to the need for unified control over air transportation:

> "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded." *Id.* at 640 (footnote omitted).

State court interposition into this field is not, in this context, distinguishable from that of other branches of state or municipal government. Each of these entities is equally ill-equipped to fulfill the role of arbiter among the often conflicting interests of safety, noise concerns and the transportation needs of the public, and each comes within *Burbank's* determination that parochial regulation of aviation cannot be permitted.

The California Supreme Court offers two grounds for its view that the awarding of tort damages falls without the ambit of *Burbank:* that such damages are merely the other side of the coin of airport proprietors' power to control noise and that damages are not in fact a form of regulation. Neither ground withstands scrutiny.

A. A "Proprietor Powers" Theory May Not Be Used to Justify State Regulation of Aircraft Operations.

Footnote 14 to the *Burbank* decision (at p. 636) expressly left unresolved the nature and extent of a proprietor's control over operations at its airport. The decision below attempts to fill this blank page by reference to a number of subsequent decisions dealing with proprietor powers (Petition, Appendix A, pp. 10-13), and then concludes: a) that such powers do exist; b) that they are sufficient to deal with airport noise problems;[2] and c) that airport proprietors, as a result, must be absolutely[3] and perpetually[4] liable for the effects of such noise.

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[2]As respondents acknowledged below, the regulatory power in which they seek to clothe proprietors is at best limited. Thus it is undisputed that a proprietor may not take actions which would have the effect of burdening interstate commerce (*British Airways Board v. Port Authority of New York*, 564 F.2d 1002, 1011 (2d Cir. 1977)); which are unreasonable, arbitrary or discriminatory (*British Airways Board v. Port Authority of New York*, 558 F.2d 75, 84 (2d Cir. 1977)); which discriminate as between classes of airport users (49 USC §1349(a)); which affect the actual flight of aircraft (*British Airways, supra*, 558 F.2d at 84); or which relate to rates, routes or services (49 USC §1305(a)(1)). Each of these areas has specifically and indisputably been preempted by the federal government.

Moreover, as the recently enacted Airline Deregulation Act of 1978 (49 USC §1302 *et seq.*) vividly demonstrates, the constraints upon proprietor action are increasing. Now, for example, not only must a proprietor refrain from discriminating against new entrants seeking to use its facility but it may no longer rely upon the buffer of limited grants of route authority by the Civil Aeronautics Board. Under the Deregulation Act, any airline desiring to serve a particular route may do so with only the barest of administrative proceedings standing in its way. *See, e.g.*, 49 USC §§1371(d)(7) and 1371(p).

[3]It is significant that the Supreme Court did not attempt to relate the extent of a proprietor's liability to the extent of its powers or to the degree it failed to exercise the same. Rather it appears to have concluded that the existence of *some*, concededly non-exclusive, level of proprietor control over noise renders the proprietor totally and exclusively liable for all noise damages resulting from the flight of aircraft using its airport.

[4]This decision likewise does not impose any apparent restrictions on the ability of a plaintiff to undertake unlimited successive actions on a "continuing nuisance" theory.

While the errors in this equation are addressed in some detail in the Petition, the most fundamental error is in the underlying assumption that a state court may compel the exercise of such proprietor powers as do exist, or punish a proprietor for the non-exercise thereof.

The notion that such indirect state action avoids the proscriptions of *Burbank* is erroneous. If the City of Burbank is barred from ordering a curfew upon operations at Burbank Airport, may it impose liability on that same airport for the proprietor's failure itself to enact an identical curfew, or undertake other noise abatement measures, under the rubric of recovery against a tort-feasor? If it may not do so, and if *Burbank* has any meaning or vitality it may not, is the state legislature or a state court in any different position?[5]

By thus confusing proprietor powers with state powers the California Supreme Court has not only offered its own answer to the question which this Court left open in *Burbank* but has in the process attempted to bend the boundaries of federal exclusivity which that decision established.

B. Imposition of Damages Is a Form of State Reguation.

The second premise on which the California Supreme Court rested its opinion is that the imposition of damages may, in the context of preemption, be differentiated from the imposition of "direct" controls. In support of this view it cited *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978), and other decisions which have followed and interpreted *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). Such reliance is misplaced. The essential principle of *Garmon,* which has been left untouched

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[5]The ordinance at issue in the *Burbank* case contained a monetary penalty as the sanction for non-compliance with the curfew. Nuisance liability for failure to comply with the court's conception of acceptable airport operations is functionally equivalent.

by subsequent decisions, is that state damage awards are a form of state control over the party against whom such damages are awarded. If an area is clearly preempted by the federal government, both direct and indirect controls on the part of the state are forbidden.

In *Sears, Roebuck & Co. v. Carpenters, supra,* this Court held that such controls were permissible in an area where Congress did not intend to occupy the entire field:

> ". . . we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action." *Id.* at 207.

Under such circumstances the courts may determine that Congressional objectives will not be undermined by specific state legislation.

A different result obtains where, as in *Garmon,* total federal preemption is found to exist. The field of aircraft noise is such an area:

> "That act [The Noise Control Act of 1972] reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control." 411 U.S. at 638.

A recent decision of the United States District Court for the Southern District of California expresses this principle well. In *San Diego Unified Port District v. Gianturco,* 457 F.Supp. 283 (S.D. Cal. 1978), the Court considered a curfew imposed on San Diego's Lindbergh Field by the California Department of Transportation. After reviewing the *Burbank* decision, it stated:

> "What the Department seeks to do here, if other states and localities do likewise, would pose very serious problems to the national network of air transportation. There is the further concern that if the De-

partment can successfully force implementation or extension of a curfew by use of a condition attached to a variance, the door will be opened to policymakers and departments at all levels of state and local government to take a similar approach whenever they wish to control airport activity. *Local and state governments should not be permitted to use variances, licenses, and permits to achieve indirectly what the Supreme Court has interdicted them from doing directly.*'' At 292 (Emphasis added).

Under the teachings of *Garmon,* the same may be said with equal force of damage awards.[6]

Conclusion.

For the reasons stated above, and in the Petition, it is respectfully submitted that this Court should issue the requested Writ of Certiorari.

Respectfully submitted,

RICHARD K. SIMON
KADISON, PFAELZER, WOODARD,
QUINN & ROSSI
Attorneys for the Burbank-Glendale-Pasadena Airport Authority

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[6]The California Supreme Court also finds support for its decision in *Griggs v. Allegheny County,* 369 U.S. 84 (1962), in which this Court permitted the recovery of damages in an inverse condemnation action against an airport proprietor. That such an award was based upon rights arising under the 14th Amendment, and thus could not be preempted, appears to have escaped the Court's attention but is addressed in the concurring opinion of the Chief Justice.

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CITY OF LOS ANGELES, *et al.*,

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vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

BRIEF OF AMICI CURIAE THE SAN DIEGO UNIFIED PORT DISTRICT AND THE COUNTY OF ORANGE, CALIFORNIA.

MICHAEL SCOTT GATZKE,
LOUIS E. GOEBEL,
CHRISTOPHER J. WALT,
LUCE, FORWARD, HAMILTON & SCRIPPS,
1700 The Bank of California Plaza,
110 West "A" Street,
San Diego, Calif. 92101,
(714) 236-1414,
Attorneys for Amici Curiae,
San Diego Unified Port District
and County of Orange, California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1406

CITY OF LOS ANGELES, *et al.*,

Petitioners,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

BRIEF OF AMICI CURIAE, THE SAN DIEGO UNIFIED PORT DISTRICT AND THE COUNTY OF ORANGE, CALIFORNIA.

Pursuant to Supreme Court Rule 42, the San Diego Unified Port District and the County of Orange, California, respectfully submit this brief *amici curiae* in support of the petition of the City of Los Angeles for this Court's Writ of Certiorari to the California Supreme Court. Counsel for all parties have consented to the filing of this brief, and copies of the letters of consent are being lodged with the Court with the filing of this brief.

Interest of Amici Curiae.

The City of Los Angeles has petitioned this Court for a Writ of Certiorari seeking review of the decision of the California Supreme Court in *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal.Rptr. 733 (1979). In that case, the California Supreme Court sanctioned the exercise of state court jurisdiction, and the application of state law nuisance standards (California Civil Code §3479 [West 1974]), to hold the City of Los Angeles liable (as the proprietor of Los Angeles International Airport (LAX)) to various residents of areas around LAX for "emotional and mental distress" allegedly resulting from noise generated by commercial jet aircraft operations.

The San Diego Unified Port District is a special district created by the California Legislature[1] for the purpose, among others, of acting as the proprietor of San Diego International Airport - Lindbergh Field (SAN), San Diego's only commercial air carrier airport. The Port District is currently a defendant in consolidated state court noise actions originally brought by approximately 900 residents in respect of more than 300 parcels of residential property in the area surrounding Lindbergh Field;[2] and it is also a defendant in a noise action brought by the San Diego Unified

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[1]San Diego Unified Port District Act, Stats. 1962, 1st Ex. Sess., c. 67, (California Harbors & Navigation Code, Appendix 1, §§1 *et seq.* [West 1978]).

[2]*Britt, et al. v. San Diego Unified Port Dist.*, San Diego Superior Court No. 367963 (June, 1975), consolidated with *Banks, et al. v. San Diego Unified Port Dist.*, San Diego Superior Court No. 379755 (March, 1976) and *Lewis v. San Diego Unified Port Dist.*, San Diego Superior Court No. 340165, interlocutory appeal taken *sub nom, San Diego Unified Port Dist. v. Superior Court*, 67 Cal.App.3d 361 (1977), *cert. denied sub nom, Britt v. San Diego Unified Port Dist.*, 434 U.S. 859 (1978).

School District.[3] In these actions, recovery is sought in total amounts exceeding $100,000,000, based, in part, on state law nuisance theories of recovery, and on liability allegations substantially similar to those made against the City of Los Angeles in *Greater Westchester*.

The County of Orange is a California public entity which is the proprietor of Orange County's commercial air carrier airport, John Wayne Airport, Orange County (JWA). The County is presently a defendant in two airport noise lawsuits brought by residents in areas in the general vicinity of JWA.[4] These lawsuits also present issues substantially similar to issues dealt with in *Greater Westchester*, and the damages alleged in these cases exceed $20,000,000.

Thus, the issues decided in *Greater Westchester* are of substantial importance to the County of Orange and to the San Diego Unified Port District since the decision is, at least potentially, of direct application to significant litigation now pending against the County and the Port District.

Question Presented.

Whether federal law has preempted the California courts from exercising their jurisdiction to regulate jet aircraft operations at an airport which is part of the national air transportation system through the award of civil tort damages under the authority of California's civil nuisance statute.

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[3]*San Diego Unified School Dist. v. San Diego Unified Port Dist.*, San Diego Superior Court No. 372835 (October, 1975).

[4]*Andrews, et al. v. County of Orange*, Orange County Superior Court No. 163621, consolidated with case numbers 163693, 165077, 205722, 165433 (November, 1968, trieu May, 1978, appeal pending); and *Anderson, et al. v. County of Orange*, Orange County Superior Court No. 273916 (August, 1977).

Summary of Argument.

In its decision in *Greater Westchester*, the California Supreme Court held that an airport proprietor could be liable under a state tort law theory of nuisance for "mental and emotional distress" allegedly suffered by persons residing in the vicinity of Los Angeles International Airport, and allegedly caused by noise generated by jet aircraft operating at that facility. The Supreme Court determined that state law nuisance standards of conduct could govern the adjudication of such cases, independent of, and without consideration for, the existing pervasive scheme of federal regulation which governs the nation's air transportation system.

Obviously, the airports in this country, particularly those which serve the commercial air carriers, are indispensable elements of the national air transportation system.[5] Carried to its logical extension, *Greater Westchester* would sanction the exercise of independent state law jurisdiction over airport operations in each of the fifty states. If *Greater Westchester* is followed, each state would be free to regulate airport operations not only by the application of their individual standards of substantive law, but by the application of their individualized procedures and litigation processes as well. This exercise of local judicial regulation of airports for noise

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[5]Air carriers certificated by the Civil Aeronautics Board pursuant to the Federal Aviation Act of 1958 are regulated by the Administrator of the Federal Aviation Administration under Part 121 of the Federal Aviation Regulations (14 CFR Part 121). Airports serving CAB certificated air carriers are regulated by the Administrator under Part 139 of the Federal Aviation Regulations (14 CFR Part 139) pursuant to the Administrator's authority under 49 USC §1432. Los Angeles International Airport holds a Part 139 certificate from the Administrator, as does the San Diego Unified Port District with respect to Lindbergh Field, and the County of Orange with respect to John Wayne Airport. All such airports are central elements in the national airport system plan which the Administrator is required to prepare, and to update periodically, pursuant to the Airport and Airway Development Act of 1970, as amended, (49 USC §1712).

related purposes through the award of civil damages under state tort law would necessarily Balkanize the national air transportation system in this country, and it therefore constitutes an impermissible and unconstitutional intrusion into a regulatory field fully occupied and preempted by the federal government.

The decision of the California Supreme Court in *Greater Westchester* should be reviewed and reversed by this Court for the following reasons:

1. The Congress of the United States of America has enacted a comprehensive scheme of federal regulation governing the operation of the national air transportation system in this country. *E.g.*, Federal Aviation Act of 1958, 72 Stat. 731, as amended, (49 USC §§1301 *et seq.*) ("the 1958 Act"), and the Airport and Airway Development Act of 1970, as amended, (49 USC §§1701 *et seq.*).

2. This Court previously has characterized this federal regulatory scheme as "pervasive," and has held that through this legislation, the federal government has fully occupied the field of aviation regulation, for noise abatement and for other purposes, preempting all state or local controls. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). The primary basis for this Court's holding of preemption in *Burbank* was that the pervasive scope of the federal regulation in this field evidenced a recognition by Congress of the special need of air transportation for *uniformity* of regulation, and a Congressional intent that such uniformity could be achieved only by regulation at the federal, not local, level.

3. The federal occupation and preemption of this field has divested the state courts of their jurisdiction to

adjudicate — particularly by the application of state law standards of conduct — matters which fall within the field occupied by the federal regulatory scheme (*e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); and the state courts have been divested of their jurisdiction to adjudicate matters affecting aviation which the Congress intended to be free from state or local regulation in any form. (*See Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976)).

4. This pervasive federal regulatory scheme has been held by the United States Court of Appeals for the Seventh Circuit to preclude the use of state law theories of tort liability, such as nuisance, to "make unlawful flights which are in accordance with federal laws and regulations." *Luedtke v. County of Milwaukee*, 521 F.2d 387, 391 (7th Cir. 1975).

5. In direct contrast to the decision of the Seventh Circuit Court of Appeals in *Luedtke*, the decision of the California Supreme Court in *Greater Westchester* sanctions the exercise of state court jurisdiction to declare unlawful — by the application of state law standards of conduct independent of the federal regulatory scheme — activity expressly permitted by federal law.

6. To permit state courts to adjudicate aviation noise issues under concepts of state tort law necessarily authorizes local courts to substitute their judgment for that of the federal government, and particularly those agencies charged by the Congress with administering the national air transportation system,[6] over activities which are at least "arguably protected" by federal law.

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[6]The Federal Aviation Administration (FAA) and the Civil Aeronautics Board (CAB).

> Such litigation also would necessarily involve the adjudication of subject matter involving conduct which would be "arguably prohibited" by the relevant federal legislation. Absent special considerations not present in this case, such adjudications by state courts are an impermissible intrusion into a federally occupied field. *See, e.g., Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1979); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

This clear conflict of decision between the United States Court of Appeals for the Seventh Circuit in *Luedtke*, and the decision of the California Supreme Court in *Greater Westchester*, justifies the exercise of this Court's certiorari jurisdiction to review the *Greater Westchester* decision. The assertion in *Greater Westerchester* of the supremacy of state tort law over subject matter which touches heavily upon the operation and integrity of the national air transportation system — a decision which is fundamentally inconsistent with the desire of the Congress for federal regulatory uniformity in that field — requires that the decision of the California Supreme Court be reversed.

REASONS FOR GRANTING THE WRIT.

I

THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN DIRECT CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The decision of the California Supreme Court in *Greater Westchester* is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975), *aff'g. in part* and *rev'g. in part on other grounds*, 371 F.Supp. 1040 (E.D. Wis. 1974).

Luedtke involved an action against an airport proprietor and five airlines brought by nearby property owners. The plaintiffs claimed, *inter alia*, that the noise, vibrations, and fumes from aircraft using Milwaukee's commercial air carrier airport (General Mitchell Field) constituted an actionable nuisance. 521 F.2d at 388-89, 391. The trial court dismissed the nuisance count (371 F.Supp. at 1045), and on appeal, the Seventh Circuit affirmed. Relying upon this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc., supra*, the Court of Appeals held that since federal laws and regulations had preempted local control of aircraft flights, the airlines and the airport proprietor could not, to the extent they complied with such federal laws and regulations, be charged under state law with negligence or creating a nuisance. 521 F.2d at 391. In explaining its holding, the Seventh Circuit reasoned that state law "cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations." *Id.*

Facing virtually identical issues in *Greater Westchester*, the California Supreme Court reached the opposite result. The court declared that federal law had not preempted the

exercise of state court jurisdiction to apply state nuisance law to personal injury claims arising from noise generated by federally authorized aircraft operations at LAX. 26 Cal.3d at 91, 100, 160 Cal.Rptr. at 734, 739.

It is therefore appropriate for this Court to exercise its jurisdiction under 28 USC §1257(3), and to grant the Petition of the City of Los Angeles for a Writ of Certiorari to resolve this conflict of decision between the California Supreme Court and the United States Court of Appeals for the Seventh Circuit on a question of federal constitutional and statutory law which is of national significance.

II

THE DECISION OF THE CALIFORNIA SUPREME COURT IS WRONG, VIOLATIVE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, AND CONTRARY TO EARLIER DECISIONS OF THIS COURT.

A. Federal Law Has Fully Occupied the Field of Airspace Management and Aviation Regulation.

1. The Historical Conflict Between Federal and Local Authority in the Regulation of Aviation Noise.

Greater Westchester is the first case in which a state court has exercised its jurisdiction and, applying state law nuisance standards, awarded damages for alleged "mental and emotional distress" to persons residing in the vicinity of a major commercial airport for harm alleged to have resulted from aircraft noise.

Nevertheless, while this particular form of regulation over aviation noise now adopted by the State of California is in that sense unique, the fundamental controversy between local and federal authority in this field is not new. Particularly since the introduction of modern commercial jet aircraft in the late 1950's and early 1960's, there has been a

continuing tension between efforts to impose local regulations restricting aircraft operations for noise abatement purposes, and the particular need of the national air transportation system to be free of such parochial restraints, and to be subject instead to a uniform scheme of federal regulation.

These efforts at local regulation of certain aspects of the national air transportation system have taken various forms. But with virtual unanimity, the lower courts have consistently looked past the particular form of the local regulation and focused instead on its purpose and effect.[7] In each case, if the court has found that the effect of the local regulation was to impinge upon the free use of the federal airways,[8] or to intrude, directly or indirectly, upon the federal function of airspace management, the local regulation has been held unconstitutional. The courts have consistently recognized that Congress has commanded, under the Federal Aviation Act of 1958, as amended, related legislation, and the implementing regulations of the enforcing agencies, that reg-

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[7]Such an analysis is consistent with that suggested by this Court in a preemption context in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) where the Court observed, "Pre-emption . . . is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." (403 U.S. at 292).

[8]"Navigable airspace" is defined in the Federal Aviation Act of 1958 as all airspace above the minimum altitudes of flight prescribed by the FAA in its regulations, and "includes airspace needed to insure safety take-off and landing of aircraft" (49 USC §1301(29)). "Federal airways" are any portion of the navigable airspace of the United States designated as such by the Secretary of Transportation (49 USC §1301(21)). The "federal airways" and other special airspace designations have been established by the FAA in Parts 71, 73 and 75 of the Federal Aviation Regulations (14 CFR Parts 71, 73 and 75).

In the Federal Aviation Act of 1958, the Congress declared that the United States was to "possess and exercise complete and exclusive national sovereignty in the airspace of the United States" (49 USC §1508), and Congress further declared that there existed "in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States" (49 USC §1304).

ulatory authority over the national air transportation system, for noise abatement or for other purposes, must ultimately originate from federal, and not local sources. *See, e.g., Luedtke v. County of Milwaukee, supra*, 521 F.2d at 391 (award of nuisance damages under state law against airport proprietor preempted); *San Diego Unified Port District v. Gianturco*, 457 F.Supp. 283 (S.D. Cal. 1978 [appeal pending]) (attempt by non-proprietor state agency to require airport proprietor to impose nighttime curfew preempted); *American Airlines, Inc. v. City of Audubon Park*, 297 F.Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969) (local noise-motivated ordinance regulating altitudes of flight preempted); *American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969) (local noise ordinance affecting aircraft operations preempted); *Village of Bensenville v. City of Chicago*, 16 Ill.App.3d 733, 306 N.E.2d 562 (1973) (attempt to achieve judical regulation of airport expansion and operations at O'Hare International Airport (Chicago) by means of injunctive relief preempted).

2. City of Burbank v. Lockheed Air Terminal, Inc.

This Court first faced the issue of the regulatory relationships between federal and local authorities in the field of aviation noise in *City of Burbank v. Lockheed Air Terminal, Inc., supra*. In that case, the City of Burbank adopted an ordinance which prohibited the airport proprietor, Lockheed, from permitting jet aircraft operations at Hollywood-Burbank Airport between the hours of 11:00 p.m. and 7:00 a.m. The District Court enjoined enforcement of the ordinance on Commerce Clause grounds (U.S. Const. art. I, §8, cl.3), as well as Supremacy Clause (U.S. Const. art. VI, cl.2) grounds of conflict and preemption of the field

(*Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F.Supp. 914 (C.D. Cal. 1970)). The United States Court of Appeals for the Ninth Circuit affirmed on the Supremacy Clause (457 F.2d 667 (9th Cir. 1972)).

Finding it unnecessary to reach either the Commerce Clause or conflict issues, this Court affirmed, finding that Congress had fully occupied and preempted the field. In describing the scope of the federal occupation of the field of aviation noise, the Court held:

> [T]he pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave *no room* for local curfews *or other local controls*.

411 U.S. at 638 (emphasis added).

As this Court has indicated on many occasions:

> [W]hen Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the Statute's language or *implicity contained in its structure and purpose. City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp., supra*, at 230.

Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (emphasis added). *See also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978).

In reaching its conclusion in *Burbank* regarding preemption, the Court reviewed the regulatory structure of the 1958 Act, and the regulatory purpose of the Congress, by a review of the Act's legislative history. The Court noted (411 U.S. at 627, n.3) that the Administrator of the FAA had always had broad authority to:

> develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace.

49 USC §1348(a).

In 1968, Congress expressly extended the scope of the Administrator's authority with respect to the regulation of navigable airspace to include the authority to regulate aviation noise related matters. Section 611 of the Federal Aviation Act of 1958 (49 USC §1431), added by the Act of July 21, 1968, Pub.L. 90-411, 82 Stat. 395 (''the 1968 amendment''). In the 1968 amendment, Congress directed that the Administrator,

> [i]n order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, . . . *shall prescribe* and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom.

49 USC §1431(b)(1) (emphasis added).

In 1972, Section 611 of the 1958 Act was further amended by the Noise Control Act of 1972 (Pub.L. 92-574, 86 Stat. 1234). That amendment, among other things, permitted the Administrator to apply any such standards or regulations to the ''issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter'' (49 USC §1431 (b)(1), as amended). This authority extends to the certification of air carrier airports (49 USC §1432, and 14 CFR Part 139). The 1972 amendments also provided for significant involvement in the field of aviation noise by the Environmental Protection Agency (EPA), and required consultation between FAA and EPA with respect to aviation

noise related matters. (*See Burbank, supra,* 411 U.S. at 629-32.)[9] In addition, Congress expressly provided that this EPA/FAA regulation of aircraft noise at the federal level was to include "control and abatement through the exercise of *any* of the FAA's regulatory authority over air commerce or transportation or over aircraft *or airport operations*" (49 USC §1431(c)(1) (emphasis added)).

However, while mandating that the Administrator actively regulate in the field of civil aviation for noise abatement purposes, Congress was careful to ensure that such regulatory activity would not act in derogation of the Administrator's other primary functions, aviation safety and the efficient utilization of airspace (49 USC §1348(a), (c)). In prescribing and amending any aviation noise related standards or regulations, the Administrator was required

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[9]With respect to the intent of the Congress to fully occupy the field of aviation noise, the Court in *Burbank* found of particular significance a letter written by then Secretary of Transportation Boyd to the Senate in connection with its hearings on the 1968 amendments adding Section 611 to the Act. This letter became part of the Senate Report (411 U.S. at 635, and n.13) and, as quoted by this Court in *Burbank*, it stated:

> The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. . . . H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

411 U.S. at 635.

The Congress continued this view of preemption when it adopted the 1972 amendments to Section 611. The House Report regarding that legislation states:

> No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.

H.R. Rep. No. 842; 92d Cong., 2d Sess. 10-11 (1972).

An identical statement is contained in the Senate Report. S. Rep. No. 1160, 92d Cong., 2d Sess. 10-11 (1972).

specifically to consider the other elements of his responsibility.

> "In prescribing and amending standards and regulations under this section, the FAA shall —
>
> (1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;
>
> (2) consult with such Federal, State, and interstate agencies as he deems appropriate;
>
> (3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;
>
> (4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and
>
> (5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section."

49 USC §1431(d).

It was this complex series of potentially competing considerations, and the special need for agency expertise to identify the point at which the delicate balance between them must be struck, which caused the Court to conclude in *Burbank*:

> The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 USC §1348(a), and the protection of persons on the ground. 49 USC §1348(c). Any regulations adopted by the Administra-

> tor to control noise pollution must be consistent with the "highest degree of safety." 49 USC §1431(d)(3). *The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.*

411 U.S. at 638-39 (emphasis added).

In defining the breadth of federal preemption in this field, the *Burbank* opinion was not insensitive to the traditional local interests in the regulation of noise sources. The Court observed, "[c]ontrol of noise is of course deep-seated in the police power of the States." (411 U.S. at 638). Nevertheless, the Court then immediately continued with the statement:

> Yet the pervasive control vested in EPA and in FAA under the 1972 [Noise Control] Act seems to us to leave no room for local curfews *or other local controls*.

Id. (emphasis added).

The central theme of *Burbank* is that the complex considerations involved in the regulation of aviation noise, and the particular need of the national air transportation system for a uniform scheme of regulation by an agency with the special expertise to make the necessary balancing decisions, mandates federal occupation of the field.[10] In recognition of the Congressional mandate that any regulation in this field must come exclusively from federal sources of au-

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[10]Long before *Burbank*, the Court had already noted the unique characteristics of civil air transportation as specially requiring uniformity of regulation, characterizing air transportation as:

> [a] way of travel which quickly escapes the bounds of local regulative competence [and] call[s] for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past.

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 107 (1948).

thority, and despite the historical powers of the states to control noise, the Court concluded its opinion in *Burbank* by saying:

> We are not at liberty to diffuse the powers given by congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.

411 U.S. at 640.

B. The State Courts May Not Exercise Their Jurisdiction to Regulate, by the Award of Civil Damages or Otherwise, Activity in a Field Preempted and Occupied by Federal Regulation.

It has long been established that where federal law has preempted a field of regulation, state law is displaced, and the state courts may not exercise their jurisdiction to apply state law principles to adjudicate and regulate conduct within the scope of the federal regulatory scheme.

For example, as long ago as 1907, this Court reviewed a private common law damage action attacking the reasonableness of rates charged by a shipper subject to regulation under the Interstate Commerce Act in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). In that case the Court held that the state law had been preempted by the Interstate Commerce Act, and that the underlying purpose of the Congress in adopting that legislation was to create *uniform* shipping rates which would be regulated by an expert agency created by the Congress, the Interstate Commerce Commission. *Id.* at 439-41. In view of that intent, the Court held that the private damage action, premised upon state law principles, could not be maintained, and that state law jurisdiction had been displaced.

This Court has most frequently discussed and defined the scope of this principle in the context of private damage actions which touch upon matters subject to regulation by the National Labor Relations Board under the National Labor Relations Act. In that context, the Court originally experimented with a number of doctrines designed to reconcile the interests of the states in asserting jurisdiction over certain types of conduct, and the conflict which the exercise of such jurisdiction would present to a federal objective of a uniform scheme of federal regulation. As this Court later observed regarding those experiments (*Motor Coach Employees v. Lockridge*, 403 U.S. 274, 291 (1971)):

> [E]ach of these methods sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application.

As a result, in *San Diego Bldg. Trades Council v. Garmon, supra,* the Court established the general principle that state jurisdiction must yield whenever the acts or activities which the state court would purport to regulate are either arguably protected by, or arguably prohibited by, the federal legislation. 359 U.S. at[11] 244. As the Court explained:

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[11]The California Supreme Court casually dismissed the *Garmon* principles as having been limited to the "unique nature" of the National Labor Relations Act (26 Cal.3d at 99, 160 Cal.Rptr. at 739). The essence of *Garmon* — that state law causes of action cannot be maintained when they threaten to interfere with a pervasive federal regulatory scheme — has been widely applied outside the area of labor relations. *See, e.g., Texas & Pac. Ry. v. Abilene Cotton Oil Co., supra,* (private damage action challenging reasonableness of railroad rates preempted by regulatory authority of Interstate Commerce Commission); *Miss. Power & Light Co. v. United Gas Pipe Line,* 532 F.2d 412 (5th Cir. 1976) *cert. denied* 429 U.S. 1094 (1977) (state law breach of contract action properly referred to Federal Power Commission which had been given by Congress power of "pervasive regulation" of the question at issue); *Chicago & North Western R. Co. v. Union Packing Co.*, 514

> To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Id.

There are certain important corollary principles in *Garmon* and in other decisions of this Court. First, the *Garmon* doctrine applies to civil damage actions with the same force and effect as it does to the exercise of state court equity jurisdiction. Indeed, the Court itself characterized the central issue of *Garmon* as, "whether the California court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin" (359 U.S. at 239); and the Court responded:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the [National Labor Relations] Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. *Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.* Even the States' salutary effort to redress private wrongs or grant compensation for

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F.2d 30 (8th Cir. 1975) (state law counterclaim for damages against railroad based on theory of unreasonable rates disallowed because courts lack power to determine reasonableness of an established tariff); *Public Serv. Coord. Transport v. Delaware River Port Auth.*, 114 N.J. Super. 334, *aff'd. sub nom. Transport of N.J. v. Delaware River Port Auth.*, 59 N.J. 531 (1971) (common law action for reparations against bridge operator extinguished by scope of federal regulatory legislation); *Crosby & Co. v. Air France*, 76 Misc.2d 990 (1973), 352 N.Y.S.2d 75, *cert. denied* 416 U.S. 986 (1974) (common law breach of contract action against air carrier preempted by federal law and tariffs published thereunder, which constitute exclusive sources of regulations and interpretations of a contract of air carriage).

> past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. [Citation]. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern.

359 U.S. at 246-47 (emphasis added).[12]

A second corollary of the *Garmon* doctrine, repeatedly reaffirmed by this Court, is that preemption is not avoided by "the general applicability of a state cause of action" or, in other words, that it does not matter "whether the States have acted through laws of broad general application rather than laws specifically directed towards" the central aim of the related federal legislation. *Sears, Roebuck & Co. v. Carpenters, supra,* 436 U.S. at 193 n.22; *Motor Coach Employees v. Lockridge, supra,* 403 U.S. at 292; *San Diego Bldg. Trades Council v. Garmon, supra,* 359 U.S. at 244.

Further, in assessing a preemption issue, the primary "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Bldg. Trades Council v. Garmon, supra,* 359 U.S. at 243; *see*

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[12]The California Supreme Court acknowledged that the California courts could not *enjoin* flights "conducted in strict compliance with federal regulations," in part, because to do so would create a "likelihood of direct conflict with federal law" (26 Cal.3d at 94, 160 Cal.Rptr. at 736). Yet, the Court then found that state nuisance law may nonetheless be used to declare such flights unlawful for purposes of awarding civil damages. The quoted material from *Garmon*, however, precludes such a distinction. Either remedy is impermissible, because both necessarily involve "allowing two law making sources to govern" the same preempted activity.

also Motor Coach Employees v. Lockridge, supra, 403 U.S. at 292.

Finally, the Court has indicated that it is concerned as much with a "multiplicity of tribunals and a diversity of procedures" as with "different rules of substantive law." *San Diego Bldg. Trades Council v. Garmon, supra*, 359 U.S. at 243.

The California courts which have passed on this case have uniformly failed to make the necessary preemption analysis under the principles established by this Court in *Abilene, Garmon*, and their progeny. Indeed, only the California Supreme Court even recognized the potential applicability of the preemption doctrines flowing from the *Garmon* line of cases, and that Court simply refused, without any meaningful analysis, and virtually by a sheer force of will, to apply properly the relevant preemption principles.

As observed in *Motor Coach Employees v. Lockridge, supra,*

> As it appears to us, nothing could serve more fully to defeat the congressional goals underlying the [National Labor Relations] Act than to subject, without limitation, the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law.

403 U.S. at 286.

It is inescapable that the principle just quoted, particularly in light of this Court's opinion in *Burbank*, is *at least* as applicable to the field of aviation noise regulation as it is to the field covered by the National Labor Relations Act. As this Court found in *Burbank*, the clear Congressional purpose in enacting the Federal Aviation Act of 1958, as amended by relevant noise related provisions, is a *uniform-*

ity of regulation to be administered by expert agencies under the aegis of federal law, not state law.

Nevertheless, the California courts have now asserted their jurisdiction to regulate aviation noise related matters despite the clear holding in *Burbank* that the "States and municipalities" might be let in on the planning in the field of aviation noise only by subsequent Congressional action, action which has not since been taken.[13] Contrary to both *Burbank* and *Garmon*, the California courts thus assert that "two law-making sources" may indeed govern in this field—the federal authorities applying principles of federal law, and the California courts applying principles of the state tort law. Indeed, the logical extension of the California Supreme Court's opinion in *Greater Westchester* is that, not only may "two law-making sources" govern in this field, but judicial authorities in each and every state may exercise their jurisdiction over the nation's airports to adjudicate airport operations in a noise related context.

We respectfully suggest that a review of the following three primary lines of preemption analysis established by this Court regarding the assertion of state court jurisdiction in civil damage actions demonstrates that the California Supreme Court is wrong; and that its failure to make any meaningful preemption analysis resulted in its erroneous conclusion and its erroneous assertion of state court jurisdiction.

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[13]In fact, Congress has acted, if at all, to strengthen the federal role. For example, Section 105(a)(1) of the Airline Deregulation Act of 1978 (Pub.L. 95-504, 92 Stat. 1708) [49 USC §1305(a)(1)] now expressly prohibits any State from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier" operating under federal authority. The award of state tort damages based upon the "services" provided the federally certificated air carriers as authorized by *Greater Westchester* appears directly to violate this Congressional prohibition.

1. Congressional Displacement of State Action — The "Machinists" Test.

The first line of preemption analysis which should have been considered by the California Supreme Court, but was not, was most recently and most completely discussed in *Machinists v. Wisconsin Employment Relations Comm'n, supra* (*see also Teamsters Union v. Morton*, 377 U.S. 252 (1964)). There, this Court noted that there may exist situations in certain federal regulatory fields where " '[t]he legislative purpose may . . . dictate that certain activity "neither protected nor prohibited" [nevertheless] be deemed privileged against state regulation.' " 427 U.S. at 141. Thus, although the conduct at issue in the preemption analysis may be conduct which is neither arguably protected nor arguably prohibited by the relevant federal legislation, there necessarily remains the critical preemption inquiry of whether "Congress occupied this field and closed it to state regulation." *Id.* at 146. In such a situation, "regulation by the State is impermissible because it 'stands as an obstacle to the accomplishment and execution of the purposes and objectives of the Congress.' " *Id.* at 150-51 (quoting *Teamsters Union v. Morton, supra*).[14]

Of all of the lines of preemption analysis which should have been made in *Greater Westchester*, this perhaps is the one most directly applicable to the case, and the one which most conclusively demonstrates the impermissibility of the California Supreme Court's authorization of state court jurisdiction to regulate airport operations in respect of noise related matters. *Greater Westchester* simply cannot stand together with *Machinists* and the unequivocal holding of

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[14]In the context of the *Garmon* doctrine, the *Machinists* test may be viewed as one branch of the "arguably protected" analysis. *See Sears, Roebuck & Co. v. Carpenters, supra*, 436 U.S. at 199-200 n. 30.

this Court in *Burbank* that the Congress directed uniformity of regulation at the federal level which has rendered the operation of the national air transportation system "privileged against state regulation;" and that the Congress fully intended by the breadth of the regulatory scheme to occupy the field and "close it to state regulation." The conclusion of the California Supreme Court that the State's jurisdiction may nevertheless be exercised with respect to matters squarely within the central aim of the federal legislation, and that state law standards of conduct may be applied with respect to the operation of a commercial air carrier airport, seems to require a "rationale" oriented to the result, rather than the requirements of the law.[15]

2. *The "Arguably Protected" Test.*

The second necessary line of preemption analysis which should have been considered in *Greater Westchester,* but was not adequately made, is the analysis applied to the purported exercise of state court jurisdiction over conduct which is "arguably protected" by the relevant federal legislation. In this analysis, "[c]onsiderations of federal supremacy . . . are implicated to a greater extent" than when an analysis is made under the "arguably prohibited" branch of the *Garmon* doctrine. *Sears, Roebuck & Co. v. Carpenters, supra,* 436 U.S. at 200. The decision of the California Supreme Court in *Greater Westchester* declares unlawful, under state tort law, activities which are clearly and directly protected by federal law.

Congress has "declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States" (49

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[15]This conclusion is supported at least to some extent by the concurring opinion in *Greater Westchester*, 26 Cal.3d at 105, 160 Cal.Rptr. at 742 (Bird, C. J.).

USC §1304). The exercise of that right is exhaustively regulated both by the Federal Aviation Administration and, in the case of commercial operators, the Civil Aeronautics Board. Referring specifically, for example, to the primary noise sources which resulted in the imposition of liability against the City of Los Angeles in this case (the operation of commercial jet air carrier aircraft) the Administrator of the Federal Aviation Administration regulates and certificates the air carriers themselves (49 USC §1424; 14 CFR Part 121), the aircraft which they fly (49 USC §1423; 14 CFR Parts 21 and 25), including their noise characteristics (49 USC §1431) both individually (14 CFR Part 36) and with respect to the "fleet mix" of each certificated air carrier (14 CFR Part 91, Subpart E, §91.301-311). The Adminsitrator also regulates and certificates the airmen who fly the planes for the air carriers (*e.g.*, 49 USC §1422), and the airports at which the air carriers operate (49 USC §1432; 14 CFR Part 139).

The court in *Greater Westchester* also placed substantial emphasis upon the fact that liability in that case arose from the construction and use of the north runway complex at LAX (26 Cal.3d at 91, 160 Cal.Rptr. at 734) which, the court noted, was undertaken with "substantial federal financial assistance under Grant Agreements between the City and the Federal Aviation Administration" (*Id.* at 92, 160 Cal.Rptr 735). The Federal Aviation Act of 1958 prohibits the expenditure of federal funds for the purpose of constructing any such runway complex "except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense." (49 USC §1349(a)) (emphasis added). Further, the expenditure of such federal funds for the construction of a runway complex was subject to federal regulatory provisions under

the Federal Airport Act, 49 USC §§1101 *et seq.* (repealed 1970; current statute is the Airport and Airway Development Act of 1970 [49 USC §§1701 *et seq.*]). With respect to such projects, the project applications are matters of public record, and any person with a substantial interest in the application might have filed a memorandum in opposition to the application (former 49 USC §1108(e)). The Airport and Airway Development Act of 1970, 49 USC §§1701 *et seq.*, also provides, for example, that the Secretary of Transportation may approve federal funding of such projects "only if he is satisfied that—[] the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located" (49 USC §1716(c)(1)(A)), and that appropriate public hearings have been held on the "economic, social, and environmental effects of the airport location and its consistency with the goals and objectives of such urban planning as has been carried out by the community" (49 USC §1716(d)(1)).[16]

Nor is that the extent of the federal government's regulation of air carrier activity, or its analysis of the environmental consequences of air carrier operations at any particular airport. No air carrier may operate without a certificate of public convenience and necessity from the Civil Aeronautics Board (49 USC §1371(a)) which must expressly specify the airports which each air carrier is authorized to serve (49 USC §1371(e)(1)). In considering such applications, the CAB must consider the environmental impact of proposed aircraft services on persons and property lying beneath the routes as part of the Board's decision of whether

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[16]The sponsor must also submit a written statement specifying what consideration has been given to the interest of all communities in or near which the project is located, and containing the substance of any objection to the project. 14 CFR §151.26(b)(1).

to certificate service to particular points. *Palisades Citizens Association, Inc. v. C.A.B.*, 420 F.2d 188, 191 (D.C. Cir. 1969).[17] Indeed, the CAB has placed restrictions on aircraft noise levels even in cases where a major federal action significantly affecting the environment was not involved. Applications of Colonial Airlines, CAB Orders 78-6-183/184, 78-8-116; Docket Nos. 30587 and 30591 (1978).[18]

Private citizens may participate in CAB proceedings. Any person may attend a CAB hearing and present evidence relevant to the issues. 14 CFR §302.14(b). Individuals have the right to submit comments on draft environmental impact statements (14 CFR §312.14(e)), and parties to the proceeding may testify, offer evidence, and cross-examine witnesses on the final environmental impact statement or other environmental issues within the scope of the proceeding. 14 CFR §312.17(b).

Nor are property owners affected by noise without judicial remedies. They may, for example, bring suit to enjoin airport runway development in order to test the FAA's compliance with federal law. *Steele Creek Community Ass'n v. U.S. Dept. of Transp.*, 435 F.Supp. 196 (W.D.N.C. 1977), *aff'd* 570 F.2d 346 (4th Cir. 1978).

Thus, the concerns of local interests affected by airport noise can be accommodated within the federal regulatory

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[17]Even after deregulation, the CAB continues to acknowledge its "responsibility to consider environmental matters as an element of the public convenience and necessity." 44 Fed.Reg. 45,638 (Aug. 3, 1979).

[18]The CAB's regulations implementing the National Environmental Policy Act of 1969 (NEPA), 42 USC §§4321 *et seq.*, require an environmental review of all major CAB actions which potentially affect the environment. 14 CFR §312.4(b). The entire range of actions undertaken by the Board are covered by the regulations (14 CFR §312.7(i)) including actions which would "lead to a significant increase in the ambient noise level for a substantial number of people." 14 CFR §312.10(a)(2).

scheme for airspace management. Using state court nuisance suits as the vehicle for implementing local noise decisions, however, permits the state courts to use local law to penalize federally authorized activity; to substitute their judgments for those of the expert federal agencies; and thus to pose a substantial threat that "impermissible parochial considerations may inhibit the accomplishment of legitimate national goals." *British Airways Bd. v. Port Authority of New York, Etc.*, 564 F.2d 1002, 1011 (2d Cir. 1977).

3. The "Arguably Prohibited" Test.

The third major line of preemption analysis arising from *Garmon* is invoked whenever the state court would purport to exercise its jurisdiction to adjudicate conduct "arguably prohibited" by the federal regulatory scheme. Any tort adjudication under state law regarding a proprietor's conduct in exercising its proprietary authority to regulate the use of its airport would necessarily involve issues which would fall within the scope of the "arguably prohibited" analysis.[19]

The fundamental principle of *Greater Westchester* is that local courts may exercise their judgment as to whether or not an airport proprietor has exercised its proprietary authority as landlord in a "reasonable" manner, and that the state court may award damages if it finds that the proprietor has not restricted airport use in a fashion consistent with state law standards of conduct. Presumably, however, the state court would also have to determine whether or not the proposed conduct which should have been taken by the

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[19]As discussed in Section C, *infra*, airport proprietors acting as landlords *may have* some residual regulatory authority in a field which is, as declared in *Burbank*, otherwise completely preempted to state and local agencies of government. However, any such special authority is derived from a federal source, and is subject to limitations of federal law. The discussion here assumes (as the California Supreme Court assumed) that airport proprietors may, under some circumstances, regulate airport use for noise abatement purposes.

proprietor would have resulted, directly or indirectly, in the grant of an actual or constructive "exclusive right" prohibited by 49 USC §1349(a);[20] would have been "unjustly discriminatory" within the meaning of 49 USC §1718(a)(1); would interfere or conflict with the FAA's mission of air traffic safety and airspace management (FAA/DOT, *Aviation Noise Abatement Policy* ("*Noise Policy*") (1976) at 58-59); would be unreasonable, unduly burdensome to interstate commerce, or detrimental to the operation of the national air transportation system (*Id.* at 59); or (at least according to the CAB) would be in conflict with the "policies and purposes" of the Airline Deregulation Act of 1978 (44 Fed.Reg. 9,948-52 (Feb. 15, 1979) (to be codified in 14 CFR §399.10)).

With respect to each of these matters, the FAA has observed that:

> The proprietor's obligations to refrain from imposing an undue burden on interstate or foreign commerce or discriminating unjustly, and to avoid potential conflicts with the FAA's control of airspace and air traffic, are not difficult to articulate as matters of principle *but very difficult to apply to a given factual situation.*

Noise Policy at 58 (emphasis added).

It seems inevitable that any adjudication involving concepts of state tort law, "wrongfulness," "reasonableness," or other standards intended to measure the relative accept-

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[20]The FAA has taken the position that a grant to one or more parties of a right or privilege, but excluding any other party from enjoying a similar right, is a discriminatory grant of an "exclusive right." FAA Advisory Circular 150/5190-2A (April 4, 1972). *See also* 40 U.S.Op.Att'y.Gen. 71 (1941).

Any person may file a complaint with FAA or CAB regarding any violation of the 1958 Act (49 USC §1482(a)). The Administrator's regulations on investigatory procedures (14 CFR Part 13) have recently been expanded (44 Fed.Reg. 63,720). (Nov. 3, 1979).

ability of a proprietor's conduct against some local standard of care, would necessarily involve adjudication of these very concepts which, while simple sounding, are "difficult to apply to a given factual situation," even for the expert agency, the FAA. If such matters are *not* adjudicated at the local level, the state law would essentially purport to impose principles of "strict liability" on the operation of the national air transportation system. If such issues *are* adjudicated in a state law tort context, then necessarily the local courts would be substituting their judgment for that of the expert federal agency. The potential for conflicting and inconsistent decisions among the different state courts is, obviously, substantial. The potential for conflict with *federal* policy is even greater.

C. The So-Called "Proprietor Exception" to the Holding in Burbank Is Not a Sufficient Basis for the California Supreme Court to Authorize the Exercise of State Court Jurisdiction for the Purpose of Applying State Law Standards to Review and Control Proprietor Conduct.

In footnote 14 in its opinion in *Burbank*, this Court noted that it was not considering in that case the "limits, if any [which] applied to a municipality *as a proprietor*." (411 U.S. at 635 n.14) (emphasis added). The distinction in this field between the *total* preemption of state or local police power or other general delegations of governmental authority, and the *possibility* that there is some residual regulatory authority in the local entity which is the landlord of an airport, grows out of the decision of this Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). In that case, the Court held, under the particular factual circumstances there present, that it is the obligation of the airport proprietor to acquire sufficient property interests to permit

the operation of a newly constructed airport, including property interests necessary for noise generated by aircraft operations. Lower courts have thus concluded that because of this special potential inverse condemnation liability, an airport proprietor must have some concomitant authority to regulate the use of its airport in order to limit its liability (*e.g., National Aviation v. City of Hayward*, 418 F.Supp. 417, 424 (N.D. Cal. 1976); *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667, 674 and n.8 (9th Cir. 1972)).[21]

In *Greater Westchester*, the California Supreme Court seized upon the possible existence of a "proprietor exception" and reasoned that if the proprietor is generally liable under *Griggs* and under the Federal Constitution to pay just compensation for the acquisition of property interests (U.S. Const. amends. V and XIV), the state courts may also apply their general tort law to regulate the proprietor's conduct. 26 Cal.3d at 95-99, 160 Cal.Rptr at 736-38. That holding, however, ignores the special character of the "proprietor exception" (to the extent that it exists), and results from the California Supreme Court's failure to focus upon the proper question which really was presented to it.

First, the fact that an airport proprietor may have been permitted by the Congress to retain some residual regulatory authority as landlord is not a sufficient justification for the exercise of concurrent state court jurisdiction to regulate the

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[21]The dissent in *Burbank* questioned whether the federal statutes drew a distinction between the regulatory authority of airport proprietors and nonproprietors. "If the statute actually enacted drew this distinction," Mr. Justice Rehnquist wrote, "I would of course respect it." 411 U.S. at 651. The Airline Deregulation Act of 1978, amending the Federal Aviation Act, does expressly distinguish for purposes of preemption between states or subdivisions thereof which are not proprietors, and those which are airport operators. *Compare* 49 USC §1305(a)(1) *with* 49 USC §1305(b)(1).

proprietor's conduct in the face of a pervasive federal regulatory scheme. The source of the proprietor's authority, if any, is not state law. Rather, as the Second Circuit Court of Appeals recently observed, proprietary authority itself derives from a federal source. *British Airways Bd. v. Port Authority of New York Etc.*, 564 F.2d 1002, 1010 (2nd Cir. 1977). Commenting on an earlier opinion which it had delivered in the same case (558 F.2d 75 (2nd Cir. 1977)), the court said:

> Our initial opinion in this case delineated the extremely limited role *Congress had reserved* for airport proprietors in our system of aviation management.

564 F.2d at 1010 (emphasis added).

The Court also had referred earlier to the "cooperative scheme" of aviation management which *Congress had created* between the federal agencies and, to a "limited" extent, airport proprietors, pursuant to the Federal Aviation Act of 1958. 558 F.2d at 83, 84.

However, the existence of this special authority does not imply that other state or local agencies may then evade this Court's holding in *Burbank* through the simple expedient of using their general delegations of governmental power to regulate directly, under state law, the proprietor's conduct. As noted by the United States District Court for the Northern District of California in *National Aviation v. City of Hayward, supra,* (*upholding* a *proprietor imposed* curfew in the face of a *Burbank* challenge):

> [I]t seems clear that if this ordinance was passed by a state or local government not the proprietor of the airport, it would run afoul of *Burbank* and would constitute an impermissible exercise of police power in an area preempted by Congress.

418 F.Supp. at 421.

And when a state agency which is not the proprietor of an airport attempts under state law to require an airport proprietor to impose a proprietary use restriction, such as a curfew, the effort constitutes an unconstitutional intrusion into the federally preempted field and a violation of this Court's decision in *Burbank. San Diego Unified Port Dist. v. Gianturco, supra*, 457 F.Supp. at 292 (S.D. Cal. 1978). Indeed, the Civil Aeronautics Board, in commenting on the preemption provisions of the Airline Deregulation Act of 1978 (49 USC §1305(a)(1)) has noted:

> The full scope of [proprietor] rights and powers has yet to be developed, but *it is clear that the airport proprietor must be acting on its own, not under legislative compulsion*, and that its actions must be reasonable, non-discriminatory, and non-burdensome to interstate commerce and reasonably prompt.

44 Fed.Reg. 9,948, 9,951 (Feb. 15, 1979) (Implementation of Preemption Provisions of the Airline Deregulation Act of 1978) (emphasis added).[22]

As noted earlier, when the proprietor does act to regulate the use of its airport in some fashion that might affect the use of the federal airways, his conduct is subject to substantial limitations of federal law. Further, the FAA has taken the position that any proprietor action to restrict the

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[22]The California courts are not airport proprietors and thus lack the essential "status" (*Lockheed Air Terminal, Inc. v. City of Burbank, supra*, 457 F.2d at 674) necessary to regulate in this field. Although the CAB speaks here to "legislative compulsion," there is no reason to believe that it would find "judicial compulsion" more acceptable. That *Burbank* prohibits local courts from engaging in such regulation by using the "proprietor exception" to regulate proprietor conduct has already been recognized. *Village of Bensenville v. City of Chicago*, 16 Ill.App.3d 733, 735 (1973); and *Luedtke v. County of Milwaukee, supra*, 521 F.2d at 390-91.

use of its airport should be subject to the FAA's review because,

> [w]hile the airport proprietor is best situated to judge the local noise problem and to determine how to respond to it, he is not always in the best position to judge the impact of his noise reduction proposal on the national and international air transportation systems. Because of the intricacy of those systems, use restrictions at a single airport could, under certain circumstances, cause wide-spread disruption throughout those systems.

Noise Policy at 58.

Recognizing that it "has the obligation to assure that proprietor actions to meet local needs do not conflict with national and international purposes" (*Id.*), the FAA requires that a proprietor considering a "use restriction" as a tactic for noise abatement submit the proposal in advance to the FAA with: (1) a full description of alternative noise abatement techniques; and (2) a statement of the proprietor's reason for adoption of a use restriction rather than other noise abatement alternatives. The FAA requires prior submission so that it can "ensure that uncoordinated and unilateral restrictions at various individual airports do not work separately or in combination to create an undue burden on interstate or foreign commerce, unjustly discriminate or conflict with FAA's statutory regulatory authority" (*Noise Policy* at 59); and the FAA characterizes this prior review of proposed use restrictions as "vital." *Id.* Proprietor adopted use restrictions not approved in advance will not be recognized by the FAA as valid, and a proprietor adopting a use restriction without prior FAA approval may expect to be a defendant in litigation initiated by the United States. *Noise Policy* at 59-60.

While there may be some "extremely limited" role for proprietors to play in the noise abatement planning process, in cooperation with the federal authorities, and under the aegis of Congressional authority and federal law, the inquiry of the California Supreme Court in *Greater Westchester* as to whether or not this "proprietor exception" exists, misses the essential point which the court had to resolve. The question before the court in *Greater Westchester*, and the question presented to this Court, is *not* whether an airport proprietor has some residual authority to regulate the use of its airport. Rather, the question (assuming the proprietor does have some such residual authority) is whether the proprietor's conduct is subject to the supervision of federal law, or whether state courts may apply state law standards to review—and to control—the proprietor's exercise of its discretion in the otherwise preempted field. In other words, assuming that the proprietor can regulate, does that fact justify the exercise of state court jurisdiction subjecting the airport proprietor to potentially inconsistent standards of conduct? Is the regulatory scheme in this field to be uniformly subject to federal authority, or may the aviation abatement process be subject to the review and control of the states, acting through the state courts, applying state law? Those questions, which are the ones which should have been decided by the California Supreme Court in *Greater Westchester*, were answered by this Court in *Burbank*:

> We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.

411 U.S. at 640.

Congress has not since acted to permit California, through its legislative or executive branches, or through its courts, to participate in the planning process. If the holding of this Court in *Burbank* is to have continued vitality, *Greater Westchester* must be reversed.

III

CONCLUSION.

The threat to the integrity of the national air transportation system, and to the Congressional goal of regulatory uniformity, posed by the California Supreme Court's assertion of state court jurisdiction to apply state law standards of conduct to the operation of the nation's airports is substantial. This Court should grant certiorari in order to make clear that this type of local intrusion into the preempted regulatory field is constitutionally impermissible.

Respectfully submitted,

MICHAEL SCOTT GATZKE,
LOUIS E. GOEBEL,
CHRISTOPHER J. WALT,
LUCE, FORWARD, HAMILTON & SCRIPPS,
Attorneys for Amici Curiae, the San Diego Unified Port District and the County of Orange, California.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1406

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,
Respondents.

BRIEF OF *AMICUS CURIAE* CITY AND COUNTY OF SAN FRANCISCO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GEORGE AGNOST,
City Attorney
DONALD J. GARIBALDI,
Airports General Counsel

DAVID I. KROOPNICK,
Assistant Airports
General Counsel

Attorneys for Amicus Curiae
City and County of San Francisco

KAREN J. KEARNS,
Legal Assistant
206 City Hall,
San Francisco, California 94102,
(415) 558-3875

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Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1718 5

California Government Code, Title 7.1, Sections 66500-66522 8

APPENDICES

A. Airports Commission Resolution No. 79-0003.
January 16, 1979

B. Airports Commission Resolution No. 79-0297.
August 21, 1979

C. Airports Commission Resolution No. 79-0351.
October 2, 1979

D. Civil Aeronautics Board (CAB) Letter to San Francisco International Airport (SFO).
February 13, 1979

E. Federal Aviation Association (FAA) Letter to SFO.
March 2, 1979

F. SFO Letter to FAA.
March 21, 1979

G. Metropolitan Transportation Corporation (MTC) Letter to CAB.
March 14, 1979

H. CAB Letter to MTC.
April 3, 1979

I. FAA Letter to SFO.
April 9, 1979

J. CAB Letter to *San Francisco Bay Association.*
May 15, 1979

K. SFO Director Memo to SFO Airports Commission.
September 25, 1979

L. SFO Letter to FAA.
October 5, 1979

M. Air Transport Association (ATA) of America Letter to FAA.
October 9, 1979

N. Congressional Letter to FAA.
October 24, 1979

O. FAA Intradepartmental Memo.
November 7, 1979

P. FAA Letter to SFO.
November 7, 1979

Q. FAA Letter to ATA.
November 8, 1979

R. SFO Letter to FAA.
October 25, 1979

S. FAA Letter to SFO.
November 20, 1979

T. SFO Letter to FAA.
November 20, 1979

U. SFO Letter to FAA.
November 23, 1979

V. SFO Letter to FAA.
November 23, 1979

W. FAA Letter to SFO.
December 13, 1979

X. SFO Letter to FAA.
January 9, 1979

Y. Airports Commission Resolution No. 80-0080.
April 1, 1980

Z. Letters of Consent to File as *Amicus Curiae.*
March 17, 1980
March 18, 1980

BRIEF OF *AMICUS CURIAE* CITY AND COUNTY OF SAN FRANCISCO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The City and County of San Francisco, a municipal corporation, acting by and through its Airports Commission, respectfully submits its brief, *amicus curiae,* with the consent of the parties pursuant to United States Supreme Court Rule 42, in support of the position advanced by Petitioner City of Los Angeles. Copies of the letters of consent are filed herewith.

INTRODUCTION

Your *amicus curiae,* City and County of San Francisco, by and through its Airports Commission, owns and operates San Francisco International Airport (SFO), which is located physically outside the jurisdictional boundary of San Francisco and entirely within San Mateo County, California.

SFO is the sixth busiest publicly owned, commercial airport in the world and the fifth busiest airport in the Nation in terms of passenger traffic; it serves approximately 24 million passengers a year and accommodates every domestic major trunk air carrier in the United States, many foreign flag carriers and a sizable amount of general aviation. Specifically, for the calendar year ending December 31, 1979, SFO handled 367,435 aircraft operations, which transported 102,292 tons of mail, 382,730 tons of airfreight/express and 24,159,924 passengers.

SFO serves all of northern California, western Nevada, southern Oregon and southwest Idaho and has a major impact on interstate commerce and the economy of this entire region of the United States. SFO is also the northern terminus of the most heavily traveled air corridor in the world.*

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* Los Angeles is the southern terminus of this corridor.

It is clear from the foregoing description that SFO plays a major role in the national air transportation system and hence is inevitably affected by the decision of the California Supreme Court in *Greater Westchester Homeowners Association* v. *City of Los Angeles,* 26 Cal. 3d 86 (1979) which holds the local proprietor of an airport liable for nuisance damages resulting from the noise related to aircraft in flight.

The interest of your *amicus* in this case concerns the economic effect of the decision in *Greater Westchester* that erroneously imposes an untold financial burden on a local public agency, as the proprietor of an airport, for conduct which is legally beyond its control. This *amicus* has further concern about the effect of the decision in *Greater Westchester* in that by making a local public agency (such as this *amicus*) assume liability for nuisance damages caused by aircraft noise, it places this *amicus*—as well as other local public agencies—between Scylla and Charybdis by forcing your *amicus* to adopt local noise abatement rules and regulations (to avoid nuisance liability) which will conflict with the Congressional intent to establish a national air transportation scheme based on a comprehensive, federally-regulated balance between the "highest degree of safety" and the effective control of airport noise.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. Preliminary Statement

Your *amicus,* City and County of San Francisco, adopts by reference the brief of Petitioner City of Los Angeles in the Petition for Writ of Certiorari.

2. The Problem Created By Greater Westchester

In support of the Petition and to assist the Court, this *amicus* wishes to bring to the Court's attention and to have it take notice of the frustrating, unresolved problem this *amicus* has faced in trying unsuccessfully to participate from the local level in the federal scheme of regulation and control of airport noise and at the same time satisfy the noise standard require-

ments of the State of California. This is a problem which is now aggravated by the decision in *Greater Westchester* because it interjects a collateral, mandated form of regulation in the already complex nationwide plan to control airport noise: regulation by a state court (non-airport proprietor) through the award of money damages. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). Further, *Greater Westchester* obscures the particular authority or ability, if any, the local airport proprietor has to regulate and control airport noise that in fact originates from a source beyond the proprietor's command: aircraft in flight. Stated another way, the problem generated by *Greater Westchester* creates the need for this Court to provide a definition and declaration of authority—or inversely, of responsibility—sufficiently precise to permit the airport proprietor to avoid nuisance liability by conforming its conduct to function within the national air transportation scheme while meeting the requirements of the law.

In conjunction with the other *amici curiae* supporting the Petition, your *amicus*, City and County of San Francisco, will illustrate the administrative fact of federal control over the national air transportation system and thereby show the inability of the local airport proprietor to exercise authority to mitigate aircraft noise in any manner inconsistent with the pervasive, comprehensive noise policy of the Federal Government—a fact which effectively manifests the intent of Congress in the Federal Aviation Act of 1958[1] and the Noise Control Act of 1972,[2] to place the problem of aircraft noise under the exclusive control of one decision-maker to establish a uniform federal regulatory scheme. This intent of Congress to preempt state and local control over aircraft noise was clearly stated by this Court in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and then echoed and followed by the Seventh Circuit Court of Appeals in *Luedtke* v. *County of Milwaukee*, 521 F. 2d 387 (1975).

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[1] 72 STAT 731, 49 U.S.C. Sec. 1301 *et seq.*

[2] 86 STAT 1234, P.L. 92-574.

THE RECENT HISTORY OF NOISE CONTROL EFFORTS AT SFO

Plainly stated, the California Supreme Court, in its decision in *Greater Westchester,* has totally misconstrued the rights and obligations of a local public agency-airport proprietor in the national aviation scheme and has, thereby, erroneously imposed an absolute liability on the local proprietor for conduct clearly beyond its control. As an aid to depict the error of *Greater Westchester,* your *amicus* brings to the Court a picture of the federal preemptive administrative action taken against efforts to adopt noise control measures at SFO.

1. The Interim Noise Policy Adopted at SFO

On January 16, 1979, the San Francisco Airports Commission adopted an Interim Noise Policy at SFO by Resolution No. 79-0003 (Appendix A) for the purpose of ameliorating noise problems caused by planes in flight in the vicinity of SFO. The resolution simply required that carriers inaugurating service at SFO use aircraft which complied with the noise level requirements of Part 36 of the Federal Aviation Regulations (FAR) of the Federal Aviation Administration (FAA). In adopting this resolution, your *amicus* in good faith sought to impose noise level standards which the Federal Government itself had established.

Upon review, the General Counsel of the FAA and the Civil Aeronautics Board (CAB) informed the San Francisco Airports Commission (see Appendices D and E) that the adopted policy was legally deficient under Federal law in that:

> 1. It conflicted sharply with federal policy as set forth in the Airline Deregulation Act of 1978 (P.L. 95-504) which was enacted to foster entry of newcomers into new interstate markets.

2. It appeared to violate the Constitutional prohibitions against discriminatory local regulation of interstate commerce in its applicability to new but not to incumbent airlines.

3. It raised possible conflict with grant assurances under the Airport and Airway Development Act (49 U.S.C. Sec.1718) and thus jeopardized the right of this *amicus* to receive federal grant money.

4. It may have violated Section 308(a) of the Federal Aviation Act (49 U.S.C. 1349(a)) which prohibits exclusive use of a facility upon which Federal funds have been expended.

5. It may have conflicted with a detailed federal noise policy developed by the Department of Transportation.

The FAA recommended adoption of an alternate interim noise policy *based on* the noise level requirements of FAR Part 36 as specified in FAA Advisory Circular 36-3 (AC 36-3). This *amicus,* acting again in good faith and reliance on the FAA, rescinded the previously adopted Interim Noise Policy by Resolution No. 79-0297 (Appendix B) on August 21, 1979, and took steps to implement a new policy based on AC 36-3. Parenthetically, this Circular was subsequently found to be technically inaccurate and consequently rendered the proposed alternate interim noise policy unsound and ineffective even as a short-term regulatory method of aircraft noise control (discussed at pp. 9-10). In its Resolution No. 79-0351 (Appendix C) adopted on October 2, 1979, the San Francisco Airports Commission stated that it could not responsibly implement a noise policy based upon the errors and inaccuracies in AC 36-3 and urgently requested the FAA to supply technical talent to work with SFO in the development of yet a new policy to be adopted by the Airports Commission not later than December 4, 1979. Since no technical assistance was provided by the FAA, the Airports Commission took no action on December 4 to adopt an alternate interim noise policy but rather put the

matter in abeyance until such assistance was forthcoming. Soon thereafter, on December 14, 1979, the California Supreme Court rendered the *Greater Westchester* decision. As of this writing, no adequate technical assistance or administrative guidance has been provided to SFO by the FAA (nor the CAB) for the development of an effective noise control plan consistent with federal policy.

2. The Intervening Issue

Indeed, what follows is obvious: your *amicus*, City and County of San Francisco, now faces absolute liability in tort for damages caused by the noise from aircraft in flight at SFO. Yet, in its efforts to control noise at SFO (and thereby avoid or abate any nuisance liability resulting from the *Greater Westchester* decision), your *amicus* continues to be confronted with the federal challenge that SFO is overstepping its regulatory powers and is in conflict with a uniform federal air transportation scheme. The question must now be asked: How does the City and County of San Francisco, as proprietor and operator of SFO, extricate itself from this "Catch-22" situation?

The frustration of this situation can be further amplified. There has been extensive correspondence between this *amicus* and the FAA and the CAB and from other interested agencies and parties since the adoption of the SFO Interim Noise Policy on January 16, 1979, that vividly illustrates the problematic administrative dilemma your *amicus* is facing at SFO in trying to effectuate noise control measures consistent with federal standards (which also satisfy state requirements) and likewise be responsive to the legitimate environmental concerns of the communities surrounding SFO. Copies of particularly relevant correspondence are included in this brief as Appendices and are discussed in the following to show the actuality of the federal intention to preclude any unilateral exercise of control by a local airport proprietor over noise from aircraft in flight. Absent the ability to exercise such control, how can an airport proprietor logically be held liable in tort for nuisance damages caused by the noise from aircraft in flight?

3. Federal Agency Administrative Action Concerning SFO Demonstrates Federal Preemption

As noted, the FAA and the CAB took immediate action against the SFO Interim Noise Policy which was adopted on January 16, 1979 (Appendix A). Appendices D and E, letters from the CAB dated February 13, 1979, and the FAA dated March 2, 1979, respectively, attack the resolution as being contrary to law and as usurping an area preempted by the Federal Government. Thus, while on the one hand the FAA enunciated its Aviation Noise Abatement Policy[3], on the other hand, it threatened legal action against SFO's attempt, as a noise abatement measure, to require compliance by aircraft with noise standards established by that same FAA. What follows now is a chronological trail of administrative correspondence—and action—in consequence to the FAA and the CAB declarations against the SFO Interim Noise Policy.

The San Francisco Airports Commission responded to these threats of punitive action in a letter dated March 21, 1979 (Appendix F), by stating its willingness to reevaluate the Interim Policy in view of the federal objections raised and to cooperate with the FAA and the CAB in the development of a policy both legal and effective in dealing with the noise problems at SFO. Direct consultation with the Federal Government was stressed by the Airports Commission as a much preferred alternative to legal confrontation on the threatened issues. The Airports Commission further sought to familiarize the federal agencies with the absolute necessity of the Interim Policy as a positive, necessarily stringent measure to maintain compliance with the State of California noise standards, as well as federal noise *and safety* requirements, until a long-range noise control policy could be developed in concert with the ongoing Airport Joint Land Use Study (between SFO and San Mateo County).

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[3] FAA, Department of Transportation, Aviation Noise Abatement Policy (November 18, 1976).

In connection with federal policy, there is a Regional Transportation Plan (RTP) in the San Francisco Bay area which provides for a balanced regional airport system; it was developed by the Metropolitan Transportation Commission (MTC)[4]. In its response to the CAB on March 21, the San Francisco Airports Commission identified the challenged Interim Policy as directly responsive to the RTP. To confirm this fact, the Airports Commission referred to a letter dated March 14, 1979 (Appendix G), in which the MTC expressed concern that the CAB's position could undermine regional as well as local airport regulatory policies, particularly since the MTC itself had passed a resolution supportive of the SFO Interim Policy.

The MTC pointed out that the adoption of the Interim Policy by the San Francisco Airports Commission was in the furtherance of the FAA-subsidized goals of the regional plan in that it sought "a redistribution of future airline traffic among San Francisco, Oakland and San Jose airports in order to maximize runway and airspace and air safety—and to minimize airport noise and air pollution." (See Appendix G)

The CAB's response to the MTC analysis on April 3, 1979 (Appendix H), reiterated the conflict between the Interim Policy and "the letter and spirit" of the Airline Deregulation Act of 1978. While asserting that SFO was capable of and responsible for the construction of a nondiscriminatory plan to limit aircraft operations, the CAB also cautioned that the question of whether this plan would conflict with the federal scheme was one primarily for the DOT and the FAA to answer.

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[4] The MTC is a local area planning agency for the region (San Francisco Bay Area) comprised of the City and County of San Francisco and the Counties of Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano and Sonoma. Its statutory authority lies in Title 7.1 of the California Government Code, Sections 66500-66522. Two general functions of the MTC, among others, are to review transportation and transportation-related projects for compatibility with the RTP, and to make recommendations concerning allocations of grant money available under federal and state transportation assistance programs.

On April 9, 1979, and on May 15, 1979, the FAA and the CAB, respectively, reaffirmed their positions on the illegality of the Interim Noise Policy in written responses to SFO (Appendix I) and to the request of a community organization, *Save San Francisco Bay Association* (Appendix J), to reconsider the policy as a solution to the environmental problems facing SFO.

Continuing with the chronology, as indicated, on August 21, 1979, the SFO Interim Noise Policy was rescinded by Resolution 79-0297 (Appendix B). SFO staff, relying on the advise and technical expertise of the FAA, then took immediate action to develop an alternate interim noise policy based upon the aforementioned noise standards in AC 36-3. However, as mentioned, AC 36-3 was subsequently found to be inaccurate due to substantial errors made by the FAA in the publication of AC 36-3 which rendered the proposed alternate interim noise policy at SFO unusable.

On September 25, 1979, in a memorandum to the Airports Commission (Appendix K), SFO's Director expressed the administrative frustration over the impossibility of predicting the effect of any interim policy based on such a document. But recognizing the need for SFO to develop immediate noise mitigation measures which would maintain SFO in compliance with State noise law, SFO's Director recommended that the Commission demand by formal resolution assistance from the FAA no later than December 4, 1979.

On October 2, 1979, the Airports Commission unanimously passed Resolution No. 79-0351 (Appendix C); it requests the FAA to assign a high-level technician to work in the development of a new SFO noise policy. This resolution was sent to the FAA on October 5, 1979, with a cover letter (Appendix L) in which SFO alleged that the FAA AC 36-3 contained "substantial errors"—an allegation which was also raised by the Air Transport Association (ATA) in a letter to the FAA on October 9, 1979 (Appendix M).

The allegations of "substantial errors" in AC 36-3 were ultimately confirmed by conversations between SFO and FAA officials and staff personnel (see October 5 letter, Appendix L). Furthermore, the October 5 letter emphasized the upsetting effect on the surrounding community created by the failure of the inaccurate FAA Advisory Circular and the resulting urgency to develop a policy which would abate aircraft noise at SFO.

The immediacy of the need to correct the problem created by the errors in the FAA AC 36-3 was recognized by Congressman John L. Burton, Chairman of the Government Activities and Transportation Subcommittee of the House of Representatives, in his written request to the FAA on October 24, 1979, for technical assistance at SFO (Appendix N).

In a memo dated November 7, 1979 (Appendix O), the FAA denied having any knowledge of inaccurate aircraft noise levels in the 36-3 Circular. And the FAA Chief Counsel, in a letter of the same date (Appendix P), admitted that the Circular contained "relatively minor" technical errors but claimed such errors did not in any way affect the concept of the regulation. The errors were explained as an inevitable result in the continually changing subject of aviation noise and that revisions would be forthcoming. The FAA likewise rejected the charges by the ATA that the 36-3 Circular was unsuitable as a basis for establishing an SFO noise policy and confirmed the Circular as their stated policy to reduce aircraft noise impacts around airports in this country (Appendix Q).

The FAA and the CAB made no direct response to the Airports Commission resolution of October 2, 1979, which requested technical assistance. But, in furtherance of the request, on October 25, 1979, SFO again formally solicited the FAA Administrator for immediate assistance in SFO's efforts to design a noise monitoring system needed to implement a noise control policy (Appendix R). The FAA stated its inability to assign the needed technical personnel to the SFO effort in a brief reply one month later (Appendix S).

In a series of letters to the FAA in late November 1979 (Appendices T, U and V), SFO's Director reiterated SFO's continuing frustration and persisted in seeking FAA assistance in the development of a noise monitoring system that would correct the technical problems created by Circular 36-3 and so permit this *amicus* to lower aircraft noise levels sufficiently, in order to avoid the imposition of operational restrictions denounced by the federal authorities. On December 13, 1979, the FAA defended its position on the technical sufficiency of AC 36-3 and passively recommended the adequacy of indirect technical support to SFO by consultants for the Massachusetts Port Authority in correspondence to SFO's Director (Appendix W; see also Appendix S).

On January 9, 1980, in a letter to the FAA Chief Counsel (Appendix X), SFO's Director expressed an unchanged concern with respect to the technical insufficiency of AC 36-3, requested verification of a proposed FAA revision and plaintively asked: "When can we anticipate receiving this revision?".

The January 9 letter ends the trail of administrative correspondence. As of now, your *amicus* has received neither a response nor an official notification of any revision to AC 36-3, nor has there been further federal response to SFO's dilemma of trying to implement an environmentally sound noise control policy at SFO—one which is balanced with the "highest degree of safety."

4. Sequel

As a Parthian shot, on April 1, 1980, the San Francisco Airports Commission, acting once more with a good faith effort and reliance on the fact that the Federal Government preempts the field of regulation of noise from aircraft in flight, adopted Resolution No. 80-0080 (Appendix Y). It effectively urges the FAA officials, air carriers and pilots to utilize their respective control over aircraft operations to provide relief and protection from aircraft noise to San Francisco and densely populated areas of the Bay Area—relief and protection which your *amicus* has neither the power nor the authority to provide.

CONCLUSION

In view of the prominent conflict between the intent of Congress to regulate the Nation's complex air transportation system under a uniform federal scheme (as positively voiced by this Court in *Burbank*), and the effect of the decision by the California Supreme Court in *Greater Westchester*, it is apparent that the local public agency-airport proprietor is inextricably enmeshed in the frustrating predicament of being unable to regulate aircraft noise but having to assume liability for noise damage. The efforts of your *amicus*, City and County of San Francisco, to disentangle itself from this web of continuing countermand illustrates the Sisyphean task facing the airport proprietor. If the *Greater Westchester* decision is allowed to stand, it will operate as a financial burden which the airport proprietor alone must bear without a means of ameliorating the real problem: noise emanating from aircraft in flight.

In virtue of the need to reconcile the disharmony created by the *Greater Westchester* decision, a review by this Court is in order and the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

GEORGE AGNOST,
City Attorney
DONALD J. GARIBALDI,
Airports General Counsel
DAVID I. KROOPNICK,
Assistant Airports General Counsel
KAREN J. KEARNS,
Legal Assistant

By: .....
David I. Kroopnick
Assistant Airports General Counsel

Dated: April 10, 1980

Appendix A

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 79-0003

WHEREAS, The City and County of San Francisco, the County of San Mateo and the San Francisco International Airport are presently engaged in a comprehensive land-use study; and,

WHEREAS, One of the purposes of that study is to determine methods by which the adverse environmental impacts, particularly noise impacts, of the Airport may be reduced; and,

WHEREAS, The Civil Aeronautics Board and the Federal Government have adopted a policy of de-regulating the airline industry; and,

WHEREAS, The implementation of that de-regulation policy has had and will continue to have the effect of increasing the operations of commercial jet aircraft at this Airport; and,

WHEREAS, Those increased operations may well cause substantial increases in the noise impact of the Airport on its surrounding neighbors and,

WHEREAS, The aforementioned Land-Use Study has developed a substantial base of data upon which decisions can be predicated which data may become inaccurate if a proliferation of operations is permitted to occur at this time; and,

WHEREAS, The Airports Commission and staff are now preparing as part of the land-use study an operations plan which will include a variety of measures designed to reduce noise impacts on the surrounding communities; and,

WHEREAS, The orderly completion of the land-use study and of the Airport's operations plan can only be accomplished in a relatively stable operating situation; and

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 79-0003

WHEREAS, This Commission basically favors the de-regulation policy and does not desire to restrict competition nor does it desire to discriminate against or in favor of any air carrier, but this Commission also finds that some immediate short-range action must be taken to prevent an unreasonably large increase in operations at this critical time in the development of the land-use study which increase might well create an unreasonably large increase in airport-generated noise; and,

WHEREAS, This Commission further finds that the interim policy herein set forth and hereby adopted is neither anti-competitive nor discriminatory in view of the unused airfield capacity in the Bay Area;

NOW THEREFORE, BE IT HEREBY RESOLVED:

1. That this Commission hereby adopts this Policy as an interim measure to remain in effect until either the completion of the land use study or until the completion, acceptance and implementation of an Airport operational plan designed to reduce the adverse effects on the surrounding communities of Airport generated noise, whichever event first occurs.

2. Any commercial air carrier which is not now operating but which has the legal right to operate and which desires to operate into and out of San Francisco International Airport shall be required to first present to the Airports Commission at a public hearing a full operating plan indicating the times, routes and frequencies of all proposed flights, the aircraft to be utilized and the arrangements which are proposed to be made to deal with the servicing of aircraft, the handling of passengers baggage and freight, etc. Such plan shall

specifically indicate whether or not each aircraft which the carrier proposed to utilize is certified as meeting the noise standards of the Federal Aviation Regulations, Part 36. Such plan shall be subject to the Commission's approval.

3. It shall be the general policy of the Airports Commission to approve sub-leases or service agreements for such new air carriers and to sign Landing Fee Agreements with such carriers only when those carriers agree to exclusively utilize aircraft which are certified as meeting the noise requirements of Federal Aviation Regulation Part 36 throughout the time this Policy is in effect.

4. It shall be the policy of the Airports Commission to take such appropriate actions as may be available to it to support the goals of the Airport element of the Regional Transportation Plan so as to provide a convenient level of air transportation service to all Bay Area residents.

I hereby certify that the foregoing resolution was adopted by the Airports Commission at its meeting of JAN 16 1979

Secretary

Appendix B

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 79-0297

WHEREAS, This Commission has previously adopted, by Resolution 79-0003, January 16, 1979, an Interim Noise Policy; and

WHEREAS, The General Counsels of the Federal Aviation Administration and the Civil Aeronautics Board have informed this Commission that the adopted policy is legally deficient under Federal law in that it discriminatorily applies to new aircraft but not to incumbent carriers; and

WHEREAS, This Commission desires to adopt, and intends to adopt, an aircraft noise level control regulation on an interim basis which will be more effective than the existing policy; now, therefore, be it

RESOLVED, That this Commission announces its intention to adopt an interim aircraft noise level control regulation basically as recommended by the Airport Director; and be it further

RESOLVED, That the Commission sets for public hearing at its regular September 4 meeting the question of the actual decibel level to be incorporated into said regulations; and be it further

RESOLVED, That in order to avoid any hold-up in ADAP funding, this Commission hereby annuls and revokes Resolution 79-0003.

I hereby certify that the foregoing resolution was adopted by the Airports Commission at its meeting of AUG 21 1979

Secretary

Appendix C

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 79-0351

WHEREAS, The San Francisco Airports Commission, in an attempt to protect the surrounding communities against a large influx of noise as a result of deregulation and in order to maintain the integrity of the data developed by the Joint Land Use Study, adopted an Interim Noise Policy affecting new carriers at this Airport; and

WHEREAS, The Federal Aviation Administration declared such Policy to be discriminatory and illegal and threatened to withhold vitally needed ADAP funds until such Policy was rescinded; and

WHEREAS, The FAA recommended adoption of an alternative Interim Noise Policy based on FAA Circular 36-3; and

WHEREAS, This Commission, acting in good faith and reliance on the FAA, rescinded the previously adopted Interim Noise Policy and took steps to implement a new policy based on said Circular 36-3; and

WHEREAS, Investigation has now revealed that FAA Circular 36-3 is inaccurate as to many of the aircraft listed and fails to list many of the aircraft operating at San Francisco; and

WHEREAS, This Commission cannot responsibly adopt a Noise Policy based upon an inaccurate and inconsistent document; now, therefore, be it

RESOLVED, That this Commission strongly requests that the FAA immediately supply top level technical talent to San Francisco International

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 79-0351

Airport to work with the Airport's Noise Abatement Officer and with the Project Director and Consultants for the Joint Land Use Board in order to develop a Noise Policy that will ensure that this Airport can remain in compliance with the State of California Noise Law at least through December 31, 1980, and that such Policy be developed so that it can be adopted by the Commission not later than December 4, 1979.

I hereby certify that the foregoing resolution was adopted by the Airports Commission at its meeting of OCT 2 1979

Secretary

Appendix D

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428 IN REPLY REFER TO

February 13, 1979

Mr. Richard R. Heath
Director of Airports
Airports Commission
City and County of San Francisco
San Francisco International Airport
San Francisco, California 94128

Dear Mr. Heath:

I have received your letter of January 18, 1979, and have analyzed San Francisco Airports Commission Resolution No. 79-0003 (January 16, 1979). The Civil Aeronautics Board shares your concern for the environment of the area surrounding San Francisco International Airport. The Board sees to it that the environmental implications of its actions are considered at every stage of the decision-making process. We are also eager to help airport proprietors, such as the Commission, to take reasonable steps to protect their airport's environment. It is in a spirit of cooperation that I and the Board's legal staff have reviewed Resolution No. 79-0003.

The resolution severely restricts the use of San Francisco International Airport by new airlines not currently serving that airport. The resolution reflects the Commission's apparent belief that reduced federal economic regulation of air transportation may lead to an increase in commercial jet aircraft operations at the airport, and in turn to added noise levels in surrounding communities. The resolution restricts new airlines in several specific ways. It requires entering airlines to present to the Commission substantial information about proposed operations. Airline arrangements involving San Francisco Airport concerning routes, scheduling, aircraft to be used, and groundside arrangements, require approval of the Commission. In addition, the resolution puts the Commission in the position of approving subleases and service arrangements involving entering carriers and provides that landing fee agreements will be made "only" with "those carriers [who] agree to exclusively utilize aircraft which are certified as meeting the noise requirements of Federal Aviation Regulation Part 36." Finally, through the resolution the Commission assumes responsibility to take "appropriate actions. . . to provide a convenient level of air transportation service to all Bay Area residents."

FEB 1 '79

I have fundamental legal reservations about the method the Commission has chosen here to advance the obviously important environmental goals which you and the Board want to meet. The action of the Commission conflicts sharply with federal policy as set forth in the Airline Deregulation Act of 1978 (P.L. 95-504), which was enacted to foster entry by air carriers into new interstate markets. In addition, the resolution's applicability to new but not incumbent airlines appears to violate the Constitutional prohibitions against discriminatory local regulations of interstate commerce, see e.g., British Airways v. The Port Authority of New York, 558 F.2d 75 (2d Cir. 1977). It raises as well the possibility of conflict with grant assurances under the Airport and Airway Development Act (49 U.S.C. Sec. 1718) and thus may jeopardize your right to receive federal grant money administered by the Department of Transportation. The resolution may also violate section 308(a) of the Federal Aviation Act (49 U.S.C. 1349(a)), which provides in part:

> "There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Finally, any attempt to dictate the type of aircraft to be operated -- even if applied even-handedly -- may conflict with a detailed federal noise policy developed by the Department of Transportation. In light of these legal shortcomings, the Commission may wish to consider rescinding or substantially amending Resolution 79-0003 to conform to federal law. As it stands now, it is vulnerable to legal challenge. And, since it conflicts with the policy of the Airline Deregulation Act which this agency is charged with administering, if the resolution remains in effect, I must consider recommending legal action by the federal government. On the other hand, should the Commission replace it with a non-discriminatory policy restricting use of the airport, we, and I am sure the Department of Transportation, would be more than happy to evaluate that policy independently.

There are three important factors in considering the legality of a restrictive airport use decision. First, is the restriction discriminatory? Second, if the restriction is not discriminatory, is it nevertheless unduly burdensome to interstate commerce? Finally, does the restriction relate to the routes, rates or services of any airline in interstate commerce under authority of the Civil Aeronautics Board?

The Commission's action is discriminatory and thus unlawful because it places substantial and perhaps insurmountable burdens on entering airlines which incumbent airlines do not bear, and puts new entrants at a significant disadvantage in seeking to compete in San Francisco markets. While incumbent carriers are free to add to their schedules at will, and thus may increase their flight frequencies as they choose, the resolution makes scheduling and other operating decisions of entering carriers the subject of a public proceeding, and allows those decisions to stand only if the Commission approves them. In addition, while incumbent carriers may serve the airport with aircraft meeting current federal noise requirements, the resolution places a much stricter standard on the operations of new entrants and, in fact, forbids them to operate the same type of aircraft that incumbents may operate.

The particular method the Commission chose to protect against noise may conflict with an area that the federal government has preempted and may also unduly burden interstate commerce. The federal government has a comprehensive noise policy that phases out noisy aircraft over a four-year period and requires airlines to begin flying quieter aircraft in 1981 and to conform their entire fleets by 1985. If the San Francisco Airport, as it purports to do, or any other airport enforces more stringent equipment requirements, there would be a conflict with an area of regulation that the federal government may have preempted and there would probably be a serious disruption in interstate air service because planes lawfully departing from, say, Chicago, New York or Denver would not be able to land in San Francisco.

Non-federal enactments relating to routes, rates and schedules are clearly forbidden by section 105(a)(1) of the Federal Aviation Act. While I understand the desire of the Commission that there should be "a convenient level of air transportation service" available to Bay Area residents, any effort by the Commission to decide what that level of service is and to achieve it through the regulation of Bay Area airports is strictly prohibited by section 105(a)(1). The reason is because the Congress decided that those kinds of decisions should be made by travelers and shippers directly through the free play of market forces and that, to the extent governmental decision-making should replace competition and free consumer choice, the CAB should be the sole judge regarding airlines conducting interstate air service. The reason the Congress wants one decision-maker is obvious when you consider the chaos to interstate air service that would result if hundreds of airports around the Nation were conditioning landing and take-off rights on decisions about where airlines should be flying to and coming from.

Although my legal analysis of the situation does not support the Commission's action, perhaps you may wish to reconsider the policy, as well as legal, assumptions underlying the resolution in light of the considerable body of evidence that suggests that a competitive airline system is more likely than a strictly regulated system to minimize environmental damage. The Commission's premise seems to be that competition and new entry will cause an unacceptable increase in commercial jet operations at San Francisco International Airport. This is not necessarily the case. When airlines are forced to compete in markets, actual competition and the threat of competition by other airlines stimulate incumbent carriers to keep ticket prices down and to operate planes nearly full rather than half empty. Without adequate competition, the demonstrable tendency is the reverse: air carriers tend to charge higher ticket prices, but they compete away the extra revenues in scheduling competition -- by offering more flights and thus more operations. This is a situation with which we are thoroughly familiar at the CAB. For almost forty years the CAB regulated the airlines in a way that discouraged price competition. This produced extensive frequency competition, with the result that many airports were subjected to many more landings and takeoffs than were necessary to carry the traffic.

It is the number of aircraft operations rather than the number of airline passengers or the identity of the airline that determines how much noise people living near an airport must suffer. While the lower ticket prices of recent months have stimulated travel, the incentives of deregulation -- if price competition is allowed to develop without restriction -- are toward putting more passengers in the airplanes before putting more planes in the air. When an airline has to compete in price and keep its costs low, it will tend to hold actual aircraft operations to a minimum. And our experience shows that easy entry by non-incumbent carriers is the single most powerful force to stimulate price competition. If air carriers not currently serving an airport can arrange to use it without undue difficulty, the mere threat of new entry will encourage incumbent carriers to keep ticket prices as low as possible, and to fill their planes rather than operate half-empty flights, so as to avoid expenses which might make low fare operations unprofitable. So, discriminating against new airlines, and giving significant advantages to existing airlines not only conflicts with federal law but may well conflict with a sound environmental policy also.

The increased competition from new airlines and higher load factors also results in improved energy efficiency. A recent Air Transport Association study shows that scheduled airlines used 50 million gallons less fuel in 1978 than 1973 while carrying 78 million more passengers. Competition and the resulting higher load factors also explain why there were less than two percent more systemwide airline departures in fiscal year 1978 than in the preceding year while passenger emplanements rose nearly 12 percent. At some airports -- and our fiscal year 1978 figures show San Francisco to be one of them -- the actual number of departures decreased slightly while the number of passenger emplanements rose significantly. Figures for the first quarter of fiscal year 1979 show that although San Francisco International departures have increased modestly over the same quarter of the previous year, actual emplanements increased over 18 percent. Since we are still in a period of adjustment and transition, I would caution anyone, including myself, against using recent statistics to make firm predictions about the future. But, the indications are that increased airline competition and a better environment are not at all incompatible.

I would therefore urge you not only to reconsider the resolution but to consider carefully as well what impact new authority will have on San Francisco International Airport's environment before you make any decisions regarding restrictions which might be proposed to protect the community's environment. If you determine that restrictions are required in spite of the favorable environmental consequences which may result from increased competition, I urge you to make them consistent with the important legal requirements I have outlined.

Let me repeat again this agency's sincere willingness to be of help. I have been in contact with Clark Onstad, Chief Counsel of the Federal Aviation Administration, and am confident of his and the Department of Transportation's willingness to also assist you in the discharge of your legitimate and difficult proprietary duties. Both the CAB and the DOT will do all we possibly can to help you implement a plan which meets important legal and environmental requirements.

Sincerely,

Philip J. Bakes, Jr.
General Counsel

cc: Clark Onstad
Chief Counsel, FAA

Appendix E

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C. 20591

MAR 2 1979

Mr. Richard R. Heath
Director of Airports
San Francisco International Airport
San Francisco, California 94126

Dear Mr. Heath:

I appreciate your providing me with a copy of Resolution 79-0003 adopted by the San Francisco Airports Commission on January 16. I have very carefully reviewed that resolution and considered it in the light of your letter of January 18. I am also in receipt of a letter to you from Mr. Bakes, General Counsel, Civil Aeronautics Board, dated February 13, 1979.

Both the resolution and your letter recognize that the exclusion of authorized carriers would thwart the policy of the Airline Deregulation Act of 1978 (P.L. 95-504) which was enacted specifically to encourage the entry of air carriers into additional air transportation markets. Resolution 79-0003 does seek to impose specific requirements on air carriers not now operating at San Francisco International Airport which requirements are not imposed on air carriers presently operating there. These additional requirements include a public hearing on the new air carrier's operating plan indicating times, routes and frequency of all proposed flights. There is also a requirement that new air carriers would be required to utilize only those aircraft in their fleet which are certificated as meeting Federal Aviation Regulation Part 36 noise standards.

While I fully appreciate the concerns that underlie Resolution 79-0003, my first observation is that air carriers now operating at San Francisco are not subject to the same requirements as new entrants. Air carriers now operating at San Francisco have in their fleet and utilize on a regular, if not daily, basis aircraft which do not meet the noise standards of Part 36. Similarly I am not aware of any requirement imposed on air carriers presently operating at San Francisco to submit an operating plan to the Airport Commission which would be considered at a public hearing detailing the times, routes and frequency of all proposed

MAR 5 '79

flights whenever they initiate a schedule change, change equipment, increase the frequency of service on an existing route, or provide service on a new route.

I am certain you are aware of the written assurances provided to the FAA on behalf of the United States by the San Francisco Airports Commission contained in executed grant agreements under the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1701, et. seq.) These include the statutorily required assurances that the airport will be operated and available for the use and benefit of the public on fair and reasonable terms, without unjust discrimination, and will be open to all types, kinds and classes of aeronautical use subject to nondiscriminatory and substantially comparable rules, regulations and conditions. [see 49 U.S.C. 1718(a)(1)]

Resolution 79-0003 is, in my opinion, unjustly discriminatory in that it subjects air carriers not now operating at San Francisco International but who wish to operate there under the policies established by the Airline Deregulation Act of 1978 to rules, regulations and conditions which are not substantially comparable to those applicable to air carriers presently operating there. The rationale and basis given for this difference in treatment is the land use study currently in progress. While I recognize the possibility that the addition of new carriers at San Francisco International could impact that study, that possibility is not a sufficient basis for this difference in treatment, and it does not support the unjustly discriminatory treatment proposed by this resolution.

I am also concerned that Resolution 79-0003 may be inconsistent or in conflict with existing Federal regulations. As you know FAA has adopted regulations requiring all aircraft operating in domestic service to meet the noise standards of Part 36. [see 14 CFR Part 91 subpart E, section 91.301 et seq.] Resolution 79-0003 may have the effect of accelerating the time provided by those Federal regulations for air carriers to bring their fleets into compliance with those noise standards. To the extent this result may occur the resolution would be inconsistent and indeed in conflict with the existing Federal regulation.

I do not think that the economic discussion set forth in Mr. Bakes' letter needs repeating but I certainly do find merit in his observation that the approach chosen by the San Francisco Airport Commission may run counter to sound

Appendix F

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO
DIANNE FEINSTEIN MAYOR

SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CALIFORNIA 94128
(415) 761-0800

RUTH S KADISH
PRESIDENT
MORRIS BERNSTEIN
VICE PRESIDENT
WILLIAM K COBLENTZ
DR Z L GOOSBY
J EDWARD FLEISHELL

RICHARD R HEATH
DIRECTOR OF AIRPORTS

March 21, 1979

Mr. Clark H. Onstad
Chief Counsel
Federal Aviation Administration
800 Independence Ave., S. W.
Washington, D. C 20590

Dear Mr. Onstad:

The San Francisco Airports Commission has reviewed your letter of March 2, 1979 concerning the Commission's Interim Policy on new carriers, along with a letter from Mr. Philip Bakes, General Counsel of the Civil Aeronautics Board, dated February 13, 1979.

At its meeting yesterday afternoon, the Commission requested that I respond to your letter. The Commission stands ready to cooperate in developing a policy that is both legal and effective in dealing with the noise problems at San Francisco Airport. However, the Federal Aviation Administration and the Civil Aeronautics Board must both be aware of the fact that this Airport has a very serious noise problem and positive action is necessary to deal with it.

The federal agencies must also be aware that this Airport is governed by the California Noise Law which mandates the maintenance of a Community Noise Equivalent Level (CNEL) below certain decibel limits in one hundred percent of the residential areas surrounding the Airport. The present mandated level is 75 decibels and this Airport is in compliance, although just barely. The decibel level drops to 70 on January 1, 1981.

Projections made by noise consultants as part of the Land Use Study now under way clearly indicate that we will not be in compliance

with the 70 decibel level unless certain very stringent measures are placed in operation in the very near future. The addition of noisy aircraft to our "fleet" could well cause our CNEL level to exceed the 75db level now in effect.

The Federal Aviation Administration has reinforced the requirements of the California Noise Law by specifying, as a condition attached to our ADAP 8 Grant Agreement, that the Airport must take all appropriate measures to assure continued compliance through 1980 and to remain in compliance with the 1981 CNEL level of 70db.

The Joint Land Use Study now under way is evaluating a wide range of alternative long-range actions which the Airport might take. Each of these actions is being evaluated in relation to its affect on our noise impact as measured by the CNEL level and evaluated in terms of its operational or safety implications. The Study, however, cannot possibly be completed before the end of this calendar year. In the interim, the influx of numerous additional air carriers, utilizing noisy aircraft, will compound enormously the problem of predicting mitigation effects and taking effective action to comply with the State Law and with FAA requirements. This factor was, of course, the overriding consideration which caused the Commission to adopt the Interim Policy which is now in dispute.

I would call your attention to the fact that the policy is an interim, not a permanent, policy. It is designed to prevent our noise situation from getting completely out of hand before the Airport is in a position to evaluate the pros and cons of various mitigation measures which might be installed on a permanent basis. Therefore, any alleged "discriminatory" effect on any airline would be of short duration and could hardly be said to be a burden on interstate commerce.

We believe the threatened punitive actions contained in your letter are both premature and unresponsive to various federal policies which you appear to have overlooked. Such actions would be premature because, to date, no airline has been denied the right to operate into and out of San Francisco. All the new carriers which have received CAB authorization and which have presented their case to the Airport have been able to adjust their schedules in order to operate with FAR Part 36 certifiable aircraft. Additionally, the policy is not rigid and unbending. It does allow the Commission to exercise discretion and to be in a position to request certain actions of new carriers which will serve to alleviate the noise problems we have and to prevent their getting out of hand before the Land Use Study is completed.

A good example of the usefulness of the policy occurred yesterday. Alaska Airlines was granted route rights by the CAB between San Francisco and Seattle. In their initial conversations with us, they indicated their plans were to utilize aircraft which are not certified under FAR Part 36. After being informed of our policy and of the severeness of our noise problems, they re-examined their plans and presented to the Commission yesterday an operating plan which will utilize only B727 aircraft which are certified under FAR Part 36. They have not indicated that this requirement is unduly burdensome. Their entry into the San Francisco Airport was duly approved by the Commission.

As you are well aware, the principal means by which we can effectively control noise at this Airport lies in controlling the noise at its source: the airplane. Requiring carriers to utilize, wherever possible, noise-certified aircraft is the most effective measure this Airport can take to solve that problem.

Over a period of many years and in cooperation with the airlines and the FAA, we have adopted a wide range of runway usage and other operational measures to reduce noise. Additional measures in this area are simply not available. We have practically exhausted the supply. The only effective measures left are those which would control the number of operations and which control the type of aircraft being used. Controls on operational frequency have enormous possible economic effects and should not be undertaken without thorough and complete study. This is the task now being undertaken through the Land Use Study.

The Commission and the Airport staff are presently considering comments contained in your letter and Mr. Bakes' letter. We are evaluating possible changes in the Interim Policy to meet the objections raised. Suggestions have been forthcoming from the staff of the Regional Airport Planning Committee of the Metropolitan Transportation Commission and Assocation of Bay Area Governments. These agencies are all sponsored by the federal government, required by federal law, and funded with federal grants. The Commission desires to cooperate with them in developing an effective regional transportation plan. Our legal staff is evaluating the alternatives suggested by the Regional Airport Planning Committee, and I expect to have that evaluation completed within 30 days. We will, of course, solicit comments from both the FAA and the CAB on alternatives which appear to be both legal and effective. I would reiterate, however, that punitive actions by the federal government would be grossly premature at this time.

The Airports Commission finds itself in a position which increasingly plagues local governments. It almost appears that there is

a deliberate strategy on the part of the federal government to adopt a wide variety of policies covering the entire range of possibilities. Federal agencies are then free to pick and choose among the policies they desire to enforce. Local agencies, such as airports, are caught in an intolerable "Catch 22" position. Federal policy requires, for instance, that a regional transportation plan be developed and that all federal grants be reviewed as part of that planning process. The policy is designed to promote regional transportation planning. MTC has developed such a plan for the Bay Area. It is our very strong feeling that the Interim Policy is directly responsive to that Regional Transportation Plan. This fact is confirmed by the letter, dated March 14, 1979, addressed to Mr. Bakes from John Evans, the legal counsel for the Metropolitan Transportation Commission, to which is attached the resolution of the Regional Airport Planning Committee supporting the Commission's Interim Policy. Of what use is a federal policy which requires a regional transportation plan but preempts authority to implement that plan?

Federal policies and Congressional action strongly support land use studies, such as the one which is being conducted at San Francisco. Over 400,000 federal dollars are committed to this project. The Interim Policy is clearly designed to support that effort and to make it successful. Intervention by the federal government at this time would be highly destructive and inappropriate.

As previously stated, the FAA has required that this Airport take all necessary actions to remain in compliance with the California Noise Law. Can the FAA make such a requirement on the one hand and, on the other, state that the Airports Commission does not have the expertise, the knowledge of the local situation and the ability to determine what actions are, indeed, appropriate?

It has long been federal policy that the local airport proprietor is "responsible" for controlling the noise at an airport. That policy is based upon the conception that the local proprietor is best able to determine the proper mitigation measures to accomplish that end.

The Aviation Noise Abatement Policy dated November 18, 1976 contains the following statements:

> Page 5: 'Airport Proprietors are primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area. Such actions include optional site location, improvements in airport

design, noise abatement ground procedures, land acquisition, and restrictions on airport use that do not unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce."

Page 6: "State and Local Governments and Planning Agencies must provide for land use planning and development, zoning, and housing regulation that will limit the uses of land near airports to purposes compatible with airport operations."

Page 9: "Airport Noise Policy

To bring about further relief from excessive aircraft noise, airport proprietors are encouraged to develop aggressive noise abatement programs for their airports .... "

Page 10: "The FAA will encourage airport proprietors, who are legally responsible for the effect of aircraft noise on the surrounding community, to assess their particular noise problem and, where local authorities determine that there is a significant problem, to develop an action plan to reduce the impact of noise."

It does, indeed, seem ironic that the San Francisco Airport proprietor, having intimate knowledge of the City of San Francisco, having intimate knowledge of the mood of the residents around San Francisco, having intimate knowledge of developments in the California Courts which have held an airport may be treated as a public nuisance and subjected to damages for personal injury as a result of airport noise, having duly considered the problem in all its aspects, and having determined that the Interim Noise Policy is absolutely necessary to accomplish the purposes and responsibilities placed on it by federal law is preemptorily told by a Washington agency that that action is illegal and may subject the airport to punitive damages.

The CAB has traditionally treated the Bay Area as a single market and has certified routes into and out of this area on a hypenated basis: San Francisco/Oakland/San Jose. The CAB, in its Oakland

Service Case, has made a tentative finding, which will most certainly be confirmed by the Board, of an imbalance of air carrier service in the Bay Area and of an "under-served" condition at the Oakland Airport and of a need to encourage more traffic at the Oakland Airport and less at San Francisco. The announced policy in the Oakland Service Case is found consistent with the Regional Transportation Plan developed by the Metropolitan Transportation Commission. The San Francisco Airports Commission's Interim Policy on new carriers is in complete accord with those policies and is not discriminatory. It has not and will not bar new carriers from serving the Bay Area market. It simply places a condition upon new carriers who desire to serve that market from the San Francisco side of the Bay. If those carriers cannot meet these requirements, they may still serve the Bay Area from runways located on the East side of the San Francisco Bay at an airport which the CAB has found is very convenient to downtown San Francisco.

Clearly, the FAA policy of banning certain aircraft during nighttime hours at National Airport "discriminates" against air carriers who do not have airplanes in their fleet meeting the very restrictive noise requirements contained in that policy. Clearly, that policy is "discriminatory" in favor of air carriers whose fleets contain those less noisy aircraft. Clearly, that policy would constitute an unreasonable burden on interstate commerce were it not for Dulles and Baltimore Airports being available for the use of noisy aircraft. That same reasoning is certainly true in the Bay Area. Your letter seems to have totally ignored the fact that this area is a multi-airport area and is covered by a Regional Transportation Plan.

As stated at the outset, the Airports Commission does not desire a confrontation with the federal government on this issue. We do request direct consultation and discussions so that those of you in Washington who are unfamiliar with the local scene may understand the full implications of any federal actions before such actions are precipitously commenced.

Yours truly,

Richard R. Heath
Director of Airports

cc: Mr. Philip J. Bakes, Jr.
Mr. Langhorne Bond
Mayor Dianne Feinstein
Members, Airports Commission

bcc: Senior Staff
Noise Policy Group
San Mateo Policy Group
Members, Joint Powers B
Chris Brittle, MTC
File

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Appendix G

Metropolitan Transportation Commission

March 14, 1979
W.I.: 1201-01-01

Mr. Philip J. Bakes, Jr.
Legal Counsel
Civil Aeronautics Board
Washington, D.C. 20428

Dear Mr. Bakes:

In a letter dated February 17, 1979, the Civil Aeronautics Board challenged the legality of Resolution No. 79-003 of the San Francisco Airports Commission. This resolution provided an interim policy for entry of new air carriers at San Francisco International Airport. The position taken by the CAB raises several major issues which have far-ranging impacts not only on the operation of San Francisco Airport but, also, on the development and operation of other airports in the San Francisco Bay Area.

The Regional Airport Planning Committee, a joint committee of the Association of Bay Area Governments and the Metropolitan Transportation Commission, is concerned that the CAB position could undermine the development of a balanced regional airport system that is responsive to the public's need for more convenient airline service, lower airport noise and air pollution levels. Since the Regional Airport Planning Committee had adopted a similar resolution (attached), we request clarification of several points raised by the CAB in order that local and regional policies can be more effectively applied in the new regulatory environment.

The CAB letter cited three factors for considering whether the San Francisco Airports Commission's policy relating to new air carriers at San Francisco Airport is unduly restrictive: (1) -Is the policy discriminatory? (2) Is the policy unduly burdensome on interstate commerce? and (3) Is the San Francisco Airport preempting regulatory authority given to the CAB?

3. Does the Policy Preempt CAB Regulatory Authority?

With respect to the third point, the CAB has misjudged the intent of the San Francisco Airports Commission resolution to "take appropriate actions to support the goals of the Airport Element of the Regional Transportation Plan." While San Francisco Airport clearly cannot regulate routes, fares or schedules of airlines, it can support the goals of the regional plan by encouraging air carriers to use other Bay Area airports. The regional airport plan adopted by the Metropolitan Transportation Commission and Association

MAR 19 '79

of Bay Area Governments recommends a redistribution of future airline traffic among San Francisco, Oakland and San Jose airports in order to maximize runway and airspace and air safety -- and to minimize airport noise and air pollution. This plan was developed with substantial financial support from the FAA and has been adopted after numerous public hearings.

The fact that the Bay Area is a multiple airport hub is a fundamental point which appears to have been overlooked in the CAB response. If Bay Area air travelers are to receive "a convenient level of air transportation service," the Bay Area airports must operate as a system the same way Dulles and National are operated. Section 3a, Item (6) of the Airline Deregulation Act of 1978 emphasizes the "... encouragement of air service at major urban areas through secondary or satellite airports where consistent with regional airport plans of regional and local authorities ...". Further, the CAB has concurred with the need for new and improved service at Oakland Airport by instituting the Oakland Service Case (Docket 30699).

Therefore, the basic policy of the CAB with respect to this point in the San Francisco Resolution should be one of support for the direction the Airports Commission has taken.

2. Is the Policy Unduly Burdensome on Interstate Commerce?

The CAB's primary concern is with the proposed treatment of new carriers versus the treatment of incumbent carriers. Since the CAB has historically granted route authority to the Bay Area on a hyphenated or co-terminal basis, the CAB itself recognizes the equivalency of Bay Area airports in serving airline requirements. Given this traditional approach to providing airline service to the Bay Area, it is difficult to argue that any restrictions at San Francisco Airport limit overall airline access to the Bay Area. Such services could also be provided at Oakland and San Jose airports. Carriers lawfully departing from Chicago, New York or Denver, therefore, would still be able to land in the Bay Area. Thus the proposed policy of San Francisco Airport, encouraging carriers to use other airports as advocated in the regional plan, would not prove to be a burden for new air carriers with respect to entry into the Bay Area.

1. Does the Policy Discriminate Against New Carriers?

The CAB further argues that the requirement for new carriers to use Part 36 equipment places "substantial and insurmountable burdens on entering airlines which incumbent airlines do not bear...." While this may be true for San Francisco Airport, it is not true for the Bay Area as a whole. Because of existing activity levels and geographic locations, other Bay Area airports have a higher noise capacity for increased levels

of operations. For example, regional policies allow an increase in noise level around Oakland Airport until such time as these levels approach the noise associated with the traffic allocation in the regional airport plan. Oakland Airport, therefore, initially has a higher tolerance to non-Part 36 aircraft than San Francisco Airport where regional policies require the airport to hold noise levels constant and then decrease these levels. It is our opinion that the CAB is not consistent with the guidelines established for the Board to implement the National Environmental Policy Act. In particular, these guidelines state that in its environmental assessment the CAB recognizes the need to review pertinent "local, regional, or state plans and regulations." The content of the CAB letter indicates this has not taken place.

We would also be interested in your response to a policy whereby all carriers (new and incumbent) who wishes to initiate service on a new route would be subject to the same conditions for using Part 36 aircraft. Would such a policy be considered discriminatory?

As a final comment, actual experience in the Bay Area tends to conflict with the concept put forth in the CAB letter -- that the Airline Deregulation Act of 1978 will reduce noise exposure by reducing the number of flights. In calendar year 1978, airline operations at San Francisco Airport increased 5.8% and measured noise levels at most monitor locations around the airport increased 2-3 db.

We would appreciate a response to the comments in this letter at your earliest convenience.

Very truly yours,

John Evans,
Legal Counsel

JE:B:r

Attachment

cc: Richard Heath, Director of Airports,
San Francisco Airport

Clark Onstad
Chief Counsel, FAA

ABAG/MTC
ASSOCIATION OF BAY AREA GOVERNMENTS / Metropolitan Transportation Commission

REGIONAL AIRPORT PLANNING COMMITTEE

February 23, 1979
W.I.: 1201-01-01

RE: Interim Regional Policy Concerning New Airline Service in the San Francisco Bay Area Resulting from the Airline Deregulation Act of 1978

RESOLUTION 79-1

WHEREAS, the Regional Airport Planning Committee, a joint Committee of the Association of Bay Area Governments and the Metropolitan Transportation Commission, is responsible for preparing and updating the Airport Element of the Regional Transportation Plan for the San Francisco Bay Area; and

WHEREAS, the Federal Airline Deregulation Act of 1978 could have a significant impact on the adopted policies of the Regional Transportation Plan pertaining to the development of a safe, convenient and environmentally sound air transportation system; and

WHEREAS, the Committee is particularly concerned with the near-term adverse environmental impacts which will occur at the Bay Area airports as a direct result of the increased levels of airline service afforded by the Act; and

WHEREAS, the Regional Transportation Plan has demonstrated that environmental impacts of growing air traffic volumes can be minimized by dispersing traffic from San Francisco Airport to other

Bay Area airports; and

WHEREAS, the San Francisco Airports Commission and the City of San Jose are engaged in studies to plan future airport facilities and to determine methods by which the adverse environmental impacts of increasing airport activity on surrounding communities will be minimized;

NOW, THEREFORE, BE IT

RESOLVED, that the ABAG/MTC Regional Airport Planning Committee encourages all air carriers not presently certificated to serve the San Francisco Bay Area and who may wish to do so under the provisions of the Act, to give the highest priority to providing such service at Oakland Airport; and be it further

RESOLVED, that the ABAG/MTC Regional Airport Planning Committee encourages all air carriers who are already certificated to serve the San Francisco Bay Area but who may wish to apply for routes already served by one or more air carriers at San Francisco Airport, to give the highest priority to providing such service at Oakland Airport; and be it further

RESOLVED, that this policy shall be reviewed upon completion of the San Francisco/San Mateo Joint Land Use Study, the San Jose Economic and Planning Management Program and the Regional Airport Plan Update Program.

Approved by RAPC,
February 23, 1979

Appendix H

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428 IN REPLY REFER TO:

April 3, 1979

Mr. John Evans
Legal Counsel
Metropolitan Transportation Commission
Hotel Claremont
Berkeley, California 94705

Dear Mr. Evans:

Your letter of March 14, 1979 does not meet the points I made to Mr. Heath. The fact of the matter is that the Commission's resolution places substantial burdens on entering airlines at San Francisco International Airport which incumbent airlines do not bear, and it therefore puts new entrants at a disadvantage in seeking to compete in the San Francisco area market. At the same time, the resolution protects incumbent airlines at that airport from the competitive pressure which the possibility of new entry at the same airport places on pricing and scheduling decisions. This squarely conflicts with the letter and spirit of the Airline Deregulation Act of 1978. And, since incumbent airlines are free to increase operations and use non-FAR 36 aircraft, the means chosen (restrict new airlines) do not appear reasonably related to the end sought (restrict noise and pollution around San Francisco International Airport), thus casting additional doubt in my mind on the validity of the resolution as an exercise of proprietary rights.

The fact that the Board has treated area airports as co-terminals supports rather than conflicts with the idea that carriers should be unrestricted and treated equally in their selection of airports. The Board's co-terminal treatment of area airports cannot be taken as support for a local enactment giving incumbent carriers the preferential use of a particular airport.

The Board shares your concern about reducing noise, congestion and pollution at San Francisco Airport by encouraging the use of other Bay area airports. It was this concern that led the Board to institute the

Oakland Service Case that could lead to awards of additional authority between Oakland and Albuquerque, Atlanta, Boston, Chicago, Dallas/Ft. Worth, Denver, Detroit, Houston, Kansas City, Minneapolis/St. Paul, Philadelphia, Phoenix, Portland, Salt Lake City, and Seattle/Tacoma. The Board recognized that the Oakland airport has fine facilities but that incumbent carriers were not making optimal use of those facilities or tapping the East Bay area's potential traffic demand. The Board found that the cause of Oakland's small share of area traffic was the poor service offered by the incumbents. To provide the opportunity for the most rapid possible improvements in Oakland service, the Board tentatively concluded: that there should be additional nonstop awards in Oakland markets already receiving nonstop service where such service is not meeting Oakland's full traffic potential; that there should be new nonstop authority granted in every Oakland market in which forecast traffic in 1979 will be capable of sustaining at least one nonstop trip per day with suitable aircraft; and finally that there should be additional awards in markets already served even if they would not result in any immediate increase in the amount of nonstop service, so that any future deficiencies in service could be remedied promptly and flexibly.

When it appeared that the hearing before the administrative law judge was not progressing as rapidly as expected, the Board invited exemption applications to hasten development of mutually supportive services at Oakland. Braniff, Alaska Airlines and PSA have taken advantage of that invitation. So the Board is strongly committed to new service at Oakland, and we hope that service will encourage a more balanced use of Bay area airports.

But, actions at both the Federal and local levels to encourage use of Oakland must by law operate in a nondiscriminatory manner. You correctly point out that the Federal government manages two Washington area airports and is trying to encourage use at Dulles, the less congested airport. But, you overlook the fact that this policy acts through operating rules which allow new carriers at both airports to perform operations on the same terms and conditions as incumbent airlines. All airlines -- old or new -- can operate identical aircraft at either Dulles or National airport.

Certainly the San Francisco Airport Commission can construct a nondiscriminatory plan to limit operations at San Francisco International Airport which would avoid conflict with Federal policy in the Airline Deregulation Act. Whether an equitable plan to limit San Francisco International operations to FAR 36 aircraft would conflict with Federal

noise rules or unduly burden interstate commerce is a difficult question and is primarily one for the Department of Transportation and the Federal Aviation Administration to answer. I express no opinion on this question. From the CAB's point of view, the fundamental legal problem with the current resolution is not that airline operations at San Francisco International Airport would be restricted, but that they would be restricted in a seriously discriminatory manner.

You asked me to comment on the possibility of restricting all airlines who wish to institute service on a new route to FAR 36 aircraft. This approach, if I understand it correctly, would still allow incumbent airlines to maintain or increase operations at will on existing routes using non-FAR 36 aircraft, but would forbid any non-FAR 36 operations by new carriers on any route or by existing carriers on new routes. I have three observations. First, since existing carriers can increase noisy operations on existing routes, the proposal may not appreciably help the environment, thus raising the legal question of whether the rule is reasonably related to the airport's legitimate proprietary concern with noise control. Second, the proposal applies a much stricter standard to the operations of new carriers than the operations of incumbent carriers. This raises the same legal problems I have with the resolution now in effect, namely, that it is discriminatory and thus illegal under ADAP grant conditions, the Burbank decision and the "exclusive use" provision of section 308(a) of the Federal Aviation Act, 49 U.S.C. §1349(a). Third, since the implementation of the proposal would permit unrestricted operations only on those specific routes now flown out of San Francisco International Airport, it may well be prohibited under Section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. §1305(a)(1), which allows no state or local public agency "to enact or enforce any law, rule, regulation, standard or other provision . . . relating to routes" of Federally authorized airlines.

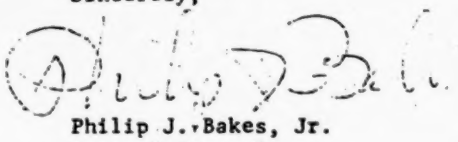
We and the Federal Aviation Administration are willing to take part in discussions of nondiscriminatory ways restricting or allocating operations at San Francisco International Airport. Richard Heath's March 21 letter to Clark Onstad, Chief Counsel of the FAA, proposes such discussions between Federal and Bay area officials. If you wish to participate, we will welcome your ideas and assistance.

Finally, I want to emphasize the point I made in my letter to Mr. Heath on the compatibility of deregulation and environmental protection. My point was not that deregulation will reduce the number of flights,

but rather that competition under conditions of open entry will tend to make airlines operate more efficiently. Thus flights that are operated will operate with more passengers. Put another way, under competition airlines will tend to fill up their seats before they add additional flights. In an environment where price competition is limited -- and this is one effect of the current resolution -- the tendency is for the airlines to engage in frequency competition, which is as detrimental to the environment as increased operations resulting from freedom of entry and lower fares, without providing any cost savings to travellers. I grant you that a full plane is just as noisy as an empty plane, but I'm sure you'll agree that one full flight is environmentally better than two half-empty flights. Although there may have been a moderate increase in operations at San Francisco International, there has been a dramatic increase in the number of passengers -- which tends to prove my point.

Again, I am prepared to help in any way I can in developing a plan consistent with law and Federal policy that meets your important environmental needs.

Sincerely,



Philip J. Bakes, Jr.
General Counsel

Appendix 1

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C. 20591

APR 9 1979

Mr. Richard R. Heath
Director of Airports
San Francisco International Airport
San Francisco, California 94126

Dear Mr. Heath:

I appreciate the concerns and arguments set out in your letter of March 21. While I am sympathetic to the legitimate environmental concerns of airport operators and airport neighbors, nevertheless I have a responsibility to point out potential legal problems, particularly when, as in this case you requested that I review the proposed San Francisco International regulations and advise you of FAA's views with respect to those proposals.

Initially let me assure you that FAA will not take precipitous action of any kind, let alone precipitous "punitive" action. When we have the all the facts we will be in a position to decide what, if any, further action is necessary or appropriate. Our advice and comments to you were based on the available information which you provided.

Frankly, your March 21, letter does not alleviate my concerns. The fundamental point of my March 2 letter to you was to point out that the proposed San Francisco policy with respect to new carriers was inherently unjustly discriminatory. It establishes conditions and restrictions applicable only to new operators at SFO while existing operators are not so constrained. The Aviation Noise Abatement Policy and every other relevant document supports the principal that unjustly discriminatory action is unacceptable.

As I stated in my earlier letter, the FAA and the City of San Francisco have worked cooperatively and effectively in the past and I hope will be able to do so in the future. We are prepared to work with you in this area. Confrontation or engaging in invective is not, in my view, a reasonable basis for resolving problems. I am prepared to meet with

APR 12 '79

you and other appropriate Bay Area officials to discuss these issues in more detail. In this connection, I called your office yesterday to try to set up an appointment on Monday, April 9, 1979, unfortunately you were on vacation.

I feel certain that a nondiscriminatory mechanism can be developed and implemented at San Francisco International. I look forward to hearing from you at your earliest convenience in order that we can get together at a mutually agreeable time and place. In closing, I feel some urgency in this matter as I am deeply troubled by the precedential nature as well as the chilling effect of the San Francisco action upon particular new entrants.

Sincerely,

Clark H. Onstad
Chief Counsel

Appendix J

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

MAY 15 1979

IN REPLY REFER TO

Mr. William E. Siri
President, Save San Francisco
Bay Association
P.O. Box 925
Berkeley, California 94701

Dear Mr. Siri:

Thank you for your letter of April 19 asking me to reconsider the position taken by the Board's General Counsel, Philip Bakes, in a February 13, letter to Richard Heath that Resolution #79-0003 of the San Francisco Airport Commission is unlawful. Mr. Bakes' position has the full support of the Board and was developed in consultation with me. In my view, it is the only position that can properly be taken in light of federal law. So that you will be clear on our position, I am enclosing copies of a series of letters on this point.

I am sorry you have the misimpression that the CAB is ignoring the serious environmental problems you face in the Bay Area. We are in fact quite sensitive to them. I enclose a letter from Phil Bakes to Mr. Evans that details our efforts to encourage use of the Oakland Airport. We are not particularly receptive to apparent "solutions" that do not materially improve environmental conditions and substantially undermine important federal policies. We are very eager to develop effective environmental protections that are consistent with federal policies.

Resolution #79-0003 placed severe restrictions on new entrants at San Francisco International Airport, but left the many existing airlines completely free to increase their operations. There may be some surface public appeal to placing some cap, any cap, on operations. But the public will not be satisfied -- nor will the environment be improved -- with a solution that just doesn't do the job it was meant to do. The noise and air pollution created by existing airlines is no less objectionable than that created by new entrants, yet the Resolution would not restrict the operations of existing airlines by fencing out only new entrants, and making special exceptions for existing airlines. Furthermore, the Resolution eliminates the single most powerful force to stimulating price competition which in turn

encourages the efficient use of fuel, aircraft and other scarce resources. We at the CAB have first hand experience to show that limiting entry reduces incentives to operate efficiently. Competitive conditions, on the other hand, encourage lower fares and more efficient operations. And, as I'm sure you realize, the efficient use of resources is a primary factor in improving the environment. By encouraging carriers to operate their planes with higher load factors, the amount of noise, pollution and fuel per passenger is reduced. We are convinced that environmental protection is consistent with competitively induced efficiencies. We have no objection to restricting operations at San Francisco International Airport to fulfill environmental goals. But any restrictions must not be selective and unjustly discriminate against one small class of companies while favoring a much larger class.

We very much want to work with local officials to develop a plan that, unlike Resolution 79-0003, is effective in protecting the environment and compatible with federal policies. We and the FAA are working on this problem and along with Mr. Heath are exploring lawful and effective solutions. It will require ingenuity and flexibility to succeed, but the effort will be well worth it.

Sincerely,

(Signed) Marvin S. Cohen

Marvin S. Cohen
Chairman

Enclosures

cc: Mrs. Dean Watkins, BCDC
Mr. George Reed, BCDC
Ms. Susan Smith
Mr. John Evans, MTC
Mr. Dennis Heath, SF Airport
Mr. Revan Tranter, ABAG
Ms. Paula Carrell, Sierra Club

Appendix K

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO
DIANNE FEINSTEIN MAYOR

SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CALIFORNIA 94128
(415) 761-0800

RUTH S KADISH
PRESIDENT
MORRIS BERNSTEIN
VICE-PRESIDENT
WILLIAM K COBLENTZ
DR Z L GOOSBY
J EDWARD FLEISHELL

RICHARD R HEATH
DIRECTOR OF AIRPORTS

MEMORANDUM

September 25, 1979

TO: MEMBERS, AIRPORTS COMMISSION
Hon. Morris Bernstein, President
Hon. William K. Coblentz, Vice President
Hon. Ruth S. Kadish
Hon. Z. L. Goosby
Hon. J. Edward Fleishell

FROM: Director of Airports

SUBJECT: Interim Noise Policy

In response to our request, we have received replies from most of the airlines concerning the Interim Noise Policy. The replies are highly inconsistent. An investigation revealed that the inconsistency resulted from a substantial error made by the FAA in the publication of their 36-3 Circular.

In describing the particular aircraft involved, the FAA mistakenly added certain descriptive material, such as "engines equipped with P36 accoustical treatment", to the descriptions for DC-8's, 707's, 727's and 737's. P-36 accoustical treatment is only applicable to DC-9 type of aircraft. Consequently, some airlines, in good faith, reported the DC-8's and 707's in their fleet ignoring the "P-36 accoustical treatment" description, while others, in good faith, reported their fleet utilizing that modifying phrase.

Additionally, we have discovered that there are a substantial number of aircraft in the fleets of the airlines operating at San Francisco which are not described in the FAA's 36-3 Circular. We were informed by the FAA that that Circular described all of the aircraft operating in the United States at this time and ranked them accurately in terms of noise produced under certain conditions.

The facts we have uncovered clearly demonstrate that the descriptions of most of the aircraft involved in our proposed Interim Noise rule is incorrect. Consequently, the reports from the airlines are inconsistent and unreliable. If the descriptions of the aircraft in Circular 36-3 were utilized as the basis for a noise policy, it would have no effect since every airline could validly report that they have no aircraft in their fleet which are described by Circular 36-3 above the 102 decibel line.

I discussed this matter with the General Counsel for the FAA, who referred us to an FAA official, Mr. Wesler, who admitted to Arn Feener that these errors and omissions were correct. Mr. Wesler stated that the FAA was going to issue and new and correct circular. He offered to provide us data for those aircraft which are not listed in the circular, which he assured us would be accurate. However, I do not believe that we can conscientiously base a policy upon an admitted inaccurate circular or upon the unofficial response of one FAA official.

I personally feel a terrible sense of frustration over this whole matter. This Commission, in good faith, adopted an Interim Noise rule to protect the surrounding communities against an onslaught of noise which might have resulted from deregulation. The FAA declared that rule illegal and requested the Commission to rescind it. The FAA also urged us to adopt a new rule, based upon that 36-3 Circular. Now it turns out that that Circular is inaccurate and fails to list many of the aircraft now operating at San Francisco. It is, therefore, impossible to predict the effect of any Interim Policy based upon such a document.

This Airport is committed to do everything in its power to maintain itself in compliance with the State Noise Law without a variance, at least through January 1, 1981. This is a condition we agreed to as part of an ADAP grant. There is no question that the noise level at the Airport is increasing rather than diminishing. We are barely in compliance in the communities that make up "the Gap". Positive action must be taken in order to remain in compliance. However, we must have accurate data in order to take such positive action.

My recommendation is that this Commission demand assistance from the General Counsel's office of the FAA, demand that a knowledgeable and competent individual be assigned to this Airport immediately to work with

Arn Feener, Walt Gillfillan and the Consultants to the Joint Land Use Study. The objective of this effort would be to develop as quickly as possible noise mitigation measures which could be adopted and immediately implemented which will retain this Airport in compliance with the State Noise Law at least through 1980 without a variance. I recommend that such measures be developed so that the Commission may adopt them no later than their first meeting in December.

An appropriate resolution is attached for your consideration.

RICHARD R. HEATH

attachment

Appendix L

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO
DIANNE FEINSTEIN MAYOR

SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CALIFORNIA 94128
(415) 761-0800

MORRIS BERNSTEIN
PRESIDENT
WILLIAM K. COBLENTZ
VICE-PRESIDENT
RUTH S. KADISH
DR. Z. L. GOOSBY
J. EDWARD FLEISHELL

RICHARD R. HEATH
DIRECTOR OF AIRPORTS

October 5, 1979

Mr. Clark H. Onstad
Chief Counsel
Federal Aviation Administration
800 Independence Ave., S. W.
Washington, D. C. 20590

Dear Clark:

I am enclosing a copy of my memorandum to the Airports Commission of September 25, 1979, to which is attached a resolution which was presented to the Commission at the October 2 meeting and passed unanimously.

As I assume you are aware by now, our conversations with Mr. Wesler confirmed the airlines' contentions that FAA Circular 36-3 contained substantial errors in describing aircraft and also substantial omissions in certain aircraft models and configurations which are utilized at this Airport. Had we adopted, for instance, a policy of eliminating all aircraft above the 102 take-off decibel line, the effect would have been zero, since no such aircraft exist in the domestic fleets as described in that Circular.

The communities around the Airport are, rather predictably, upset over this situation and it becomes even more imperative that we move forward quickly in the development of a policy which will have some effect on reducing noise at the Airport.

I would appreciate your immediate attention to this matter and ask that the FAA immediately assign a high-level technician to work intensively with us in the development of a policy which will meet the requirements of the attached resolution.

Your cooperation will be greatly appreciated.

Yours truly,

Richard R. Heath
Director of Airports

RH:dp
cc: Hon. John L. Burton
Members, Airports Commission
Walt Gillfillan
Senior Staff
File

enclosures

Appendix M

Air Transport Association OF AMERICA

1709 New York Avenue, N.W.
Washington, D. C. 20006
Phone (202) 872-4000

CLIFTON F. VON KANN
Senior Vice President
Operations and Airports

October 9, 1979

The Honorable Langhorne M. Bond
Administrator
Federal Aviation Administration
Washington, D. C. 20591

Dear Langhorne:

FAA recently published Advisory Circular 36-3, "Estimated Airplane Noise Levels in A-Weighted Decibels." This Advisory Circular was apparently issued because "both present and future rulemaking activities require knowledge of the noise levels of airplanes that may be operated in the United States."

You may be aware that the San Francisco Director of Airports recently proposed adoption of a noise regulation reading in part, "All aircraft which exceed an estimated A-weighted decibel (dBA) certificated noise level of x on takeoff, as listed in Department of Transportation, Federal Aviation Administration Advisory Circular, 36-3, dated May 29, 1979, may not operate at San Francisco International Airport." We are now faced with a situation where the Airports Commission of a major airport, serving important domestic and international markets, may decide to ban aircraft types based on the listings attached to the Advisory Circular.

Advisory Circular 36-3 was never coordinated with the airlines prior to its publication. Inquiry also indicates it was never reviewed by major airframe manufacturers, who may have serious reservations about the use of their noise level estimates in the manner contemplated by FAA when preparing the Advisory Circular for publication. We understand the listings attached to the Circular were prepared by a consultant, with some doubt that the consultant understood its intended use. Our preliminary review of the Advisory Circular listings indicates that they are riddled with errors, based on technically questionable assumptions and clearly

unsuitable as a basis for banning aircraft from operation at an airport. Attachment A lists some of our detailed objections and questions. Furthermore, we believe FAA has failed to adequately consider some important policy questions in encouraging the regulatory approach being pursued in San Francisco and implicitly in the Advisory Circular:

- The noise levels listed in the Advisory Circular bear no direct relationship to the noise levels that will be experienced in any community;

- Implementation of differing permissible noise levels at a number of airports - possibly even differing levels for each of several runways at one airport - is likely to lead to chaos in the national air transport system as specific airplane types are banned from serving the city pairs for which they are operationally and economically best suited;

- Outright banning of aircraft types from an airport as a noise control measure is inconsistent with the more comprehensive, community-related approach being advocated by FAA in the Airport Noise Control and Land Use Compatibility (ANCLUC) Study process;

- The Advisory Circular listings tend to discriminate against heavy, long range airplanes whereas the FAR 36 regulatory philosophy accounts for gross weight and number of engines;

- The Advisory Circular listings tend to discriminate against some of the most fuel efficient airplanes operated by the airlines such as the B-747. These airplanes are likely to be heavy and thus relatively more noisy than lighter airplanes, given the same level of noise technology in the airplanes being compared;

- The ultimate effect of using Advisory Circular 36-3 as a means of restricting aircraft operations may be to encourage (or force) the carriers to obtain the

lightest aircraft possible to provide planned air service. This may occur in view of the fact that if all aircraft incorporate the same level of noise control technology, the lighter the aircraft the lower the Part 36 value. In general, the lowest cost, most fuel efficient aircraft are the heaviest aircraft. Therefore, the use of a noise level rating as a means of restricting aircraft appears to conflict with two important goals, i.e., low cost transportation and reduced energy consumption. This effect is magnified if the takeoff table of Advisory Circular 36-3 is used to impose the airport access limitation.

We request that you immediately withdraw or cancel Advisory Circular 36-3. This Advisory Circular is technically indefensible. We also request that FAA reconsider the policy approach that has resulted in publication of the Advisory Circular. In our view a more careful review of the facts and their implications is in order.

ATA is prepared to assist in any review you might decide upon. We believe the expertise of the major airframe and engine manufacturers should also be utilized by FAA.

Sincerely,

Clifton F. von Kann

Attachment

cc: Mr. Clark H. Onstad
Mr. Leonard A. Ceruzzi
Mr. John E. Wesler
Mr. James E. Densmore

bcc: J. V. McGinn
ATA Regional Offices
ATA Noise Working Group
K. R. Whitehead - UA/ENO
W. E. Ryan - UA/SFO
Carl Swartz - FT
A. C. Ford - DL/ATL
Ralph Dau
Henry Hill
Lyman Tondel
R. E. Russell - Boeing
A. L. McPike - Douglas
N. Shapiro - Lockheed

JRF:lbh

Attachment A

Problems with Advisory Circular 36-3

1. The Advisory Circular introductory material admits that all of the values listed are only estimates. None of the values listed in A.C. 36-3 were obtained directly from test programs. Values listed for certificated airplanes were derived from EPNL, which is in turn a calculated value. Since there is no unique and universally applicable relationship between EPNL and A-weighted sound level, each noise level value - even for certificated airplanes - had to be obtained by some estimating procedure. Since the procedure used has not been published, there is no way that an independent verification can be made of the accuracy of the EPNL - dBA conversion.

2. Acoustic experts retained by an ATA member airline advise that the accuracy of the sound levels for certificated airplanes powered by high bypass ratio engines appears to range from ± 1 to ± 3 dB depending on measurement point - takeoff, sideline, or approach. For certificated aircraft powered by low bypass ratio engines the accuracy of the data appears to vary between ± 1 to ± 5 dB, depending on measurement point. Accuracy of sound levels for airplanes not noise certificated appears to be in the range of ± 5 dB, and may be as high as ± 10 dB.

   For the DC-8-61 (one of the non-noise-certificated airplanes in A.C. 36-3); there is some direct evidence[1/] to indicate that the noise levels shown in A.C. 36-3 are not correct. At the takeoff point, A.C. 36-3 shows that the estimated maximum sound level is 105.2 dB while Ref. 1 would indicate that it probably should be between 100 and 102 dB. The indicated level of 92.7 dB on the sideline probably should be closer to 95 dB according to Ref. 1. The estimated value of 106.8 dB for approach should be more like 102 to 104 dB according to Ref. 1. These discrepancies support the earlier statement that the general accuracy of the noise levels estimated for non-noise-certificated aircraft is probably about ± 5 dB.

   Additional evidence to support a belief that the values listed for the DC-8-61 airplane are wrong is provided by a comparison with the values listed for the DC-8-63 airplane with JT3D-7 engines at a maximum takeoff gross weight of 355,000 lbs. A.C. 36-3 lists the following values:

1/ R. E. deLapp: Aircraft Noise Definition Phase II -- Analysis of Flyover Noise Data for DC-8-61 Aircraft. FAA Contractor Report FAA-EQ-74-5, August 1974

Airplane	Sound level, dB Takeoff	Sideline	Approach
DC-8-61	105.2	92.7	106.8
DC-8-63	101.2	92.7	103.8

None of the above comparisons is likely to be correct. For takeoff, there is no reason to expect the DC-8-61 (powered by JT3D-3B engines rated at 18,000 lbs. of static thrust and with a 328,000 lbs. maximum takeoff gross weight) to be 4 dB noisier than the DC-8-63 which is powered by engines having a 19,000 lb. thrust rating and which has 27,000 lbs. more takeoff weight. For the sideline condition which is nearly independent of differences in the aerodynamic performance capabilities of the aircraft, one would expect that the DC-8-63 would be somewhat noisier than the DC-8-61, although the long fan-exhaust duct on the JT3D-7 engines for the DC-8-63 may yield some reduction in jet noise relative to that produced by the shorter fan-exhaust ducts used on the JT3D-3B engines for the DC-8-61. For the approach condition, there is again no reason why the DC-8-61 should be 3 dB noisier than the DC-8-63 which is probably landing at a higher weight than the DC-8-61.

3. A preliminary review of the takeoff data by airframe manufacturers indicates apparent errors, for both certificated and non-certificated airplanes. For example, the following entries appear to be in error (more likely estimates are listed in parentheses):

B707-320B	JT3D-3B	328,000	100.8 dBA (97.5)
B747SP	JT9D-7F wet	695,000	96.2 dBA (93.5)
B747SP	JT9D-7A	660,000	94.9 dBA (92.0)

4. The fact that there is much confusion in the data is illustrated by the notes. Note 1 indicates P.36 (Part 36) acoustical treatment on many aircraft which have no such treatment. Note 8 indicates thrust cutback used. Yet the note is missing from listings for several aircraft which have obviously used thrust cutback.

5. It appears Annex 16 data are mixed in with Part 36 data, which is probably inequitable to U.S. manufactured aircraft. Annex 16 permits greater cutbacks for many aircraft and utilizes some reference locations further from the aircraft. Furthermore, there appears to be some confusion in the sideline listings concerning the physical location for which estimates are provided. We are uncertain whether

all the values were modified for a location 450 meters from the extended center sideline, or whether some are values for 450 meters, some for .25 nautical mile and some for .35 nautical mile.

6. The potentially large errors in the value of the noise levels listed in A.C. 36-3 could result in substantial changes in the relative ranking of aircraft models if the true noise levels could be ascertained. There are a number of aircraft models ranked within one decibel on each of the three tabulations. For the takeoff listing the average number of aircraft within a one dB increment is about 5, for the sideline listing about 8 aircraft per dB and for approach about 10 aircraft per dB. (The maximum number of aircraft models within a one dB increment ranges up to three times the average value.) Thus, a $\pm$ 5 dB error would result in a shift of about 25 places in the takeoff ranking, about 40 places in the sideline ranking and about 50 places in the approach ranking. Aircraft rankings that are known to contain errors and are as sensitive to error as the rankings in A.C. 36-3 are not suitable as a basis for exclusion from an airport.

7. It is not reasonable to use certificated takeoff noise levels as a means of rating relative takeoff noise exposure in communities near airports. The certification takeoff procedures are not used in daily operation and takeoff gross weights are seldom at the maximum values shown in the Advisory Circular. Therefore, the relative community noise contribution of two aircraft types may be quite different than the relationship between their certification takeoff noise levels.

8. The poor correlation between A.C. 36-3 takeoff levels and community annoyance is well illustrated by the fact that the DC-8-20 and the DC-10-30 are adjacent on the chart at 95.8 and 95.4 respectively. The DC-8-20 is an early model powered by a straight turbojet engine and clearly recognized as one of the noisiest aircraft in the fleet. The DC-10-30 on the other hand is powered by a high bypass ratio engine and has a reputation as being among the least offensive aircraft in the airline fleet.

9. There is no estimate provided for numerous aircraft/engine configurations operated by the airlines. Many of the aircraft/engine configurations listed in the Advisory Circular are not currently operated by U. S. airlines. What is to be the source for the missing data?

10. There will undoubtedly be many alternate sources of data which disagree with the information in A.C. 36-3. For example, is the noise level information recently submitted by the U.S. to the ICAO CAN-6 meeting in BIP 24 consistent with the listings in A.C. 36-3? It is not clear how data conflicts are to be resolved.

Appendix N

—, CHAIRMAN
—, ORE.
—, WIS.
HENRY A. WAXMAN, CALIF.
MIKE SYNAR, OKLA.
ROBERT T. MATSUI, CALIF.

ROBERT S. WALKER, PA.
JIM JEFFRIES, KANS.
CLARENCE J. BROWN, OHIO

(202) 225-7920

NINETY-SIXTH CONGRESS

Congress of the United States

House of Representatives

GOVERNMENT ACTIVITIES AND TRANSPORTATION
SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-350-A-B
WASHINGTON, D.C. 20515

October 24, 1979

Honorable Langhorne M. Bond
Administrator
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Dear Mr. Administrator:

I have been informed that errors in an FAA Advisory Circular may have created a serious problem for the Airports Commission of the City and County of San Francisco as it attempts to comply with the State Noise Law of California. I would appreciate your immediate attention to this problem.

As I understand the situation, the Commission dropped its original "Interim Noise Policy" because the FAA declared it to be discriminatory and therefore illegal, and threatened the Commission with loss of ADAP funding should the policy, based on FAA Advisory Circular 36-3, "Estimated Airplane Noise Levels in A-Weighted Decibels".

That circular contains certain factual errors, which should be corrected promptly, and certainly before it is discussed at the subcommittee's scheduled hearings on noise and safety problems at the Burbank-Glendale-Pasadena, California, airport. These corrections are essential, particularly since the Airports Commission appears to believe that no policy can be implemented until those corrections are made.

The Commission has also requested, in the attached October 5, 1979, letter to Clark Onstad, Chief Counsel, that the FAA assign a "high level technician" to work with the Commission. I believe that some FAA action along these lines would be appropriate, and request that you do so.

Thank you in advance for your cooperation.

Sincerely,

JOHN L. BURTON
Chairman

JLB:BRB:bg

cc: San Francisco Airport Commission

OCT 2[illegible]

Appendix O

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

DATE: NOV 7 1979

WASHINGTON, D.C. 20591

IN REPLY REFER TO:

SUBJECT: San Francisco International Airport Noise Regulations

FROM: Director of Environment and Energy, AEE-1

TO: AGC-1

I have read the letter to you from Richard Heath, Director of Airports, City and County of San Francisco, dated October 5, 1979, and his enclosed memorandum to the Airports Commission of September 25, 1979. Inasmuch as my name is featured prominately in those two documents, I feel compelled to comment on the content and merit.

Several weeks ago, I had a 20-25 minute telephone conversation with Mr. Feener of Mr. Heath's office. Mr. Heath characterizes that conversation as an admission by me that our Advisory Circular 36-3 contains "substantial errors in describing aircraft and also substantial omissions in certain aircraft models and configurations which are utilized at this Airport." This characterization is, at best, misleading, and, at worst, patently untrue. I explained to Mr. Feener the basis on which the data in AC 36-3 were derived, and noted that there are some errors in the explanatory "Notes" included in that tabulation of aircraft noise levels. Specifically, Note "1", which indicates application of P-36 acoustic treatment, was inadvertently assigned to models of aircraft other than the DC-9, to which it properly applies. I further advised Mr. Feener that I knew of no inaccurate noise levels in the Advisory Circular, and possibly levels for some specific aircraft models might not be included (e.g., the Russian IL-62). If any missing data were important to San Francisco International Airport, I would provide our best information for those models.

The characterization of AC 36-3 as riddled with errors, based on technically questionable assumptions, and clearly unsuitable as a basis for banning aircraft from operation at an airport, appears to originate with the Air Transport Association and some of its member airlines. Keeping to its obstructionist tradition, the ATA has attacked AC 36-3 in this manner in an effort to discredit it and thus delay its use by airports for noise abatement purposes. The ATA has taken this position with each item of guidance or technical assistance which we have developed for noise purposes (e.g., the Integrated Noise Model) as a delaying tactic, and has been relatively successful.

I would point out however that it was Mr. Heath who adopted a 102 dB criterion for use restriction at San Francisco, the effect would have been nil, since (he claims) no such aircraft exist in the domestic fleets. First of all, he (not FAA) suggested the 102 2B criterion, and he should have examined its effect before proposing that value. Secondly, United Air Lines flies some models of the DC-8 which do exceed 102 dB in the AC 36-3 tabulation (and this may be the primary impact which Mr. Heath wants to avoid). Thirdly, his regulation will also apply to foreign air carriers, who probably have excluded aircraft in their fleets. Mr. Feener said he will furnish me the basis for this statement next week, and I will know more then.

I have offered to assist personnel from San Francisco International Airport in developing and implementing a noise abatement regulation. While we are not staffed to provide each airport with an "on-site" individual, we certainly will continue to support the San Francisco effort to the maximum extent feasible.

JOHN E. WESLER

Appendix P

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C. 20591

NOV 7 1979

Mr. Richard R. Heath
Director of Airports
Airports Commission
San Francisco International Airport
San Francisco, California

Dear Mr. Heath:

I have delayed responding to your letter of October 5 because I wanted to ascertain John Wesler's view of your allegation. As you will see from the enclosed memorandum, it would appear that your actions reflect both somewhat rash conclusions and are factually unsound. In fact I am quite surprised by your actions because they are so closely aligned with those of the Air Transport Association. Thus your letter of October 5 alleges FAA Advisory Circular 36-3 contains "substantial errors." This allegation has also been raised by the Air Transport Association. Senior FAA technical analysts have reviewed this Advisory Circular, as well as the source documents used in developing it. Based on that review it appears that some of the explanatory "Notes" in AC 36-3 were incorrectly coded, and work is now in progress to revise and correct those entries.

In my view these relatively minor technical adjustments do not in any way effect the concepts we discussed. As more and more data becomes available on the wide variety of aircraft models, engines and configurations it may be necessary to further revise technical conclusions. As you know the entire subject of aviation noise is dynamic and continually changing as we learn more and more. At the risk of repeating myself however, the fact of these technical developments and corrections do not, in my view, impact or effect the concepts we discussed.

NOV 13 '79

I have taken the liberty of sending copies of this letter to all of the recipients of your September 25 memorandum since I believe it is important that they understand our perspective.

Sincerely,

Clark H. Onstad
Chief Counsel

cc: Mary Schuman
General Counsel
Civil Aeronautics Board
1825 Connecticut Avenue, N.W.
Washington, D.C. 20428

Mr. Moris Bernstein
President
Airports Commission
City and County of San Francisco
San Francisco International Airport
San Francisco, CA 94128

Mr. William K. Coblentz
Vice President
Airports Commission
City and County of San Francisco
San Francisco International Airport
San Francisco, CA 94128

Ms. Ruth S. Kadish, Member
Airports Commission
City and County of San Francisco
San Francisco International Airport
San Francisco, CA 94128

Dr. Z. L. Goosby, Member
Airports Commission
City and County of San Francisco
San Francisco International Airport
San Francisco, CA 94128

Mr. J. Edward Fleishell, Member
Airports Commission
City and County of San Francisco
San Francisco International Airport
San Francisco, CA 94128

Appendix Q

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C. 20591

OFFICE OF
THE ADMINISTRATOR

November 8, 1979

RECEIVED

NOV 13 1979

OPERATIONS & ENGINEERING
DEPARTMENT

General Clifton F. von Kann
Senior Vice President
Operations and Airports
Air Transport Association
1709 New York Avenue, N.W.
Washington, D.C. 20006

Dear General von Kann:

I welcome the opportunity, afforded by your letter of October 9, to discuss the merits and potential use of our recent Advisory Circular (AC) 36-3, "Estimated Airplane Noise Levels in A-Weighted Decibels," dated May 29, 1979. Your letter criticizes both the content of this Advisory Circular and the use to which it may be put by airport proprietors, and requests that it be withdrawn or cancelled immediately.

As you recognized in your letter, AC 36-3 does provide one means by which airport proprietors may impose nondiscriminatory use restrictions at their airports for noise control purposes. Recently, in their search for methods to limit the noise impacts around their airports, airport proprietors have proposed a number of different bases for restricting aircraft use. These have included limitations or restrictions on new entrants, exclusions of non-noise-certificated aircraft, jet bans, and single-event noise measurements.

Where use restrictions are intended to limit noise, we believe that such restrictions should be based on the noise which particular aircraft generate under standardized, repeatable conditions. We published AC 36-3 to provide comparable noise levels for a wide variety of aircraft models, as measured or estimated under the procedures specified in 14 CFR 36. These values provide a straight-forward, consistent basis which airport proprietors may use in imposing noise restrictions where they are necessary, and follow the policies contained in our Aviation Noise Abatement Policy and our general approach to land-use planning around airports.

You also criticize AC 36-3 as "technically indefensible." I must reject that charge. The data included in AC 36-3 were taken from earlier Advisory Circulars 36-1B (issued December 5, 1977) and 36-2A (issued February 6, 1978). In most cases, the values tabulated in AC 36-3 were taken directly from measured sound spectra. In those few cases where measured spectra were not available, Effective Perceived Noise Levels were converted to A-Weighted Sound Levels using established calculation procedures. We are aware that, inadvertently, some of the explanatory "Notes" included in AC 36-3 were

coded incorrectly, and we are revising those entries. We will also correct any other inaccuracies which we may find. In this connection, we welcome any specific information or data concerning specific errors or inaccuracies which you may find, and any deletions or additions to the models of aircraft which we have listed. In particular, in your letter you questioned the values tabulated for a stretch DC-8 and for three Boeing models. Those values are consistent with previously published values and appear to be correct. We are examining the original data; however, and we will correct these and any other values that we find to be inaccurate.

In summary, I must reject your charges that AC 36-3 is "riddled with errors, based on technically questionable assumptions and clearly unsuitable as a basis for banning aircraft from operations at an airport." It has been, and remains our stated policy to reduce noise impacts around airports in this country, insofar as is possible within Constitutional and statutory safeguards. AC 36-3 provides one tool which may be used toward that goal.

Sincerely,

Langhorne Bond

Langhorne Bond
Administrator

Appendix R

October 25, 1979

Mr. Langhorn Bond, Administrator
Federal Aviation Administration
Washington, D.C.

Dear Langhorn:

It was a pleasure to see you again and listen to your address to the Commonwealth Club last week.

I would like once again to solicit your assistance in an effort which is extremely important and particularly to our efforts to reduce the noise impact on the surrounding communities.

One of the tentative recommendations which is before the Joint Land Use Board and which, I feel certain, will become a final recommendation of that Board, is for the installation of a more sophisticated noise monitoring system at this Airport. Such a system must be designed to monitor both low frequency as well as high frequency noises. In addition, the system must be able to tie the noise produced to specific operations. This will permit the Airport to affectively utilize a number of economic incentives and disincentives in our noise mitigation efforts. It will also permit public opinion to apply pressure to airlines to operate their aircraft in a quiet manner and to invest in new and quieter airplanes.

You will recall that I wrote you previously about the installation of such a system at San Francisco. You pledged your full support to that effort. You indicated that the Boston Airport was working on such a system and that we would be included in the common efforts of Boston and the FAA.

The General Council for the FAA has appeared here as part of our Land Use Study and has pledged full FAA technical support to the successful completion of that study.

In light of all this, I hereby formally request that the FAA immediately assign to San Francisco a technician or technicians to work directly with to design a system which will effectively tie our Noise Monitoring System to the FAA's system so that we may measure and record the actual noise produced by each operation at this Airport.

Your immediate response to this request will be greatly appreciated.

Yours very truly,

Richard R. Heath
Director of Airports

cc:Clark Onstead
Gen. Counsel, FAA

Per attached list

RRH/rml
bcc:Admin
Chron
File

cc:Hon. William Royer
Member of Congress
2121 So. El Camino Real
San Mateo, CA 94403

Hon. John M. Ward. Supervisor
County of San Mateo
Hall of Justice and Records
Redwood City, CA

Hon. J. Edward Fleishell
Airports Commission
San Francisco Int'l Airport
P.O. Box 8097
San Francisco, CA 94128

William K. Coblentz, Esq.
Airports Commission
555 California Street - #3100
San Francisco, CA 94104

Councilman Arthur Lepore
City of Millbrae
621 Magnolia Avenue
Millbrae, CA 94030

Councilman David Martin
Town of Burlingame
501 Primrose Road
Burlingame, CA 94010

Mr. Ken Brown
Executive Vice President
San Mateo Chamber of Commerce
2031 Pioneer Court #2
San Mateo, CA 94403

Hon. Louise Renne, Vice Chairman
SFO/SMC Joint Land Use Study
P.O. Box 8097
San Francisco Int'l Airport
San Francisco, CA 94128

Mr. Peter Cervantes-Cautschi, Sect
Airport Labor Coalition
300 Eighth Avenue #1
San Mateo, CA 94401

Mr. Vincent J. Mellone, Chief
BAY TRACON
Department of Transportation
P.O. Box 2367, Airport Station
Oakland, CA 94614

Members of the Council of the
Town of Hillsborough

Appendix S

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C. 20591

NOV 26 1979

Mr. Richard R. Heath
Director of Airports
Airports Commission
San Francisco International Airport
San Francisco, California 94128

Dear ~~Mr. Heath~~:

The Administrator has asked me to respond to your letter of October 25 concerning the design and installation of a more sophisticated noise monitoring system at San Francisco International Airport. As you noted in your letter the Massachusetts Port Authority is working on the design and development of a system for use at Boston-Logan Airport similar to that which you described. While this is not an FAA technical effort, FAA is working with Massport to assist them in their effort. As you are no doubt aware, the FAA has a limited budget and staff. Accordingly we are not able to assign technical personnel to San Francisco to design a system for your airport. We suggest you contact the Massachusetts Port Authority in order to gain the full benefit of the design and development work completed to date rather than engage in a total design and development effort.

Sincerely,

Clark H. Onstad
Chief Counsel

NOV 23 '79

Appendix T

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO
DIANNE FEINSTEIN MAYOR

SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CALIFORNIA 94128
(415) 761-0800

MORRIS BERNSTEIN
PRESIDENT
WILLIAM K. COBLENTZ
VICE-PRESIDENT
RUTH S. KADISH
DR. Z. L. GOOSBY
J. EDWARD FLEISHELL

RICHARD R. HEATH
DIRECTOR OF AIRPORTS

November 20, 1979

Mr. Clark H. Onstad
Chief Counsel
Federal Aviation Administration
Washington, D. C. 20591

Dear Clark:

I surely did enjoy that last letter you wrote! An' John Wesler's memo was a real whiz bang. Sure does go to show how wrongheaded us provincial types are compared to you folks in Our Nation's Capital.

Them documents was so ed-u-kay-shu-nal that I plum decided to use 'em to give my little nephew Tommie a civics lesson.

"Tommie," I said, "you read these here two papers and then we'll talk about 'em."

So Tommie he poured over them two papers fer a few minutes and then he says, "Unca Dick, I got a couple questions."

"What questions you got, Tommie?"

"Well, first of all, those explanatory notes. Are they relavent?"

"I'm sure I don't know, Tommie. Why do you want to know that?"

"Cause if they ain't relavent they got no business being in the regulations in the first place; and if they are relavent they ought to be right; and if they ain't right, they're wrong; and if they're wrong, they're in error!"

"Why, Tommie!", I says, "What you tryin' to do? Reform the world?"

"And, Unca Dick," he comes back, "I got another question. If that regulation was so all-fired perfect the first time outa the box, why they gonna revise an' correct it?"

"Tommie, I see now jest what yer problem is. You had a course in school in logic but you ain't had no tutorin' in guv-mint. You go tryin' to put that there logic to work in 'splainin' what our federal guv-mint is up to, an' you plain gonna have real problems."

"Well, at school if one of us kids makes a mistake, teacher makes us admit we made a error an' we gotta correct it. Ain't that the way the federal guv-mint works?"

"No, Tommie. It ain't. Sit down here an' I'll esplain it. See, back there in Our Nation's Capital, they got two big deals goin'. First is the Congress, and second is the bureaucracy. That thar Congress votes the money and the bureaucracy runs the guv-mint. Them is very important jobs. That ol' bureaucracy is gettin' bigger an' bigger an' that makes that ol' Congress more and more important. So that ol' Congress jest votes more and more money an' that ol' bureaucracy jest spends and spends it. Now, you can't have them big, important folks spendin' all thet big, important money out there, makin' no errors, 'cause that might git the people riled. So I think what happened is that Congress done passed a law sayin' that makin' errors was just plum illegal. Be bad fer policies both furrin an' domestic. (To say nothin' o' politics.) So that's lesson number one: ain't no way none of them Washington types kin ever make a error."

"O.K., Unca Dick. But now I got some more questions. Why do you s'pose that John Wesler used the Russian IL-62 as a example of a airplane that he forgot to put on his list?"

"Why, Honey Chile, I reckon that was jest the first li'l ol' airplane that popped into his head."

"Well, it just seems funny to me he'd mention some ol' Russian plane 'instead of, say, a DC-8-51."

"Weren't a DC-8-51 put down on that list?"

"No. An' neither was a DC-8-52, nor a DC-8-54, nor'a DC-8-33."

"Do them airplanes exist?"

"Sure do. An' operate out of San Francisco. An' that list is also missing 707-331s an' 707-338s an' 707-123s an' 747-136s an' 747-312Bs an' 727-035s an' ... "

"Now hang on thar, Tommie. You sure all them planes exist?"

"Sure am. An' just as sure they fly at SFO."

"Well, gracious, Chile, you can't expect perfection! That John Wesler, now, he's one o' them technical bureaucrats. You can't expect him to know jest every ol' airplane that anybody's got hoppin' around. Why that'd be a turrible chore fer him to collect all them numbers. Say, tell me, Tommie. How in tarnation did you get all them numbers?"

"Why I just wrote the ATA."

"You wrote the ATA? Ain't you got no sense? Why look right here in this letter. It says plain as day that they're nothin' but an obstructionist outfit."

"Well that may be, Unca Dick. But I made sure their list was right. I wrote to Boeing and McDonald Douglas and Lockheed and such like and then I put all their lists together against the ATA list and it was O.K. An' that's how I come by my list."

"Well, that's alright for you, Tommie. You're jest a 'leven year ol' school boy. You can't 'spect a big technical bureaucrat with the Federal Aviation Administration to spend his days writin' letters all over the dadburned country jest to get up some ol' list er other."

"But tell me, Unca Dick, if that list don't have all the airplanes on it and if part of it is plain wrong - 'scuse me - if some of them notes is a wee bit misplaced, how the world you gonna enforce that regulation?"

"Enforce it? Enforce it? Why, Chile, thar's prob'ly a thousan' or so ways to enforce it. Why just let me think a minute an' I'll shorely come up with several. Why you could ... An' if thet didn't work, you could ... An' then you might try ... Well, land a goshen, you kin always jest whip out another regulation. Now Tommie, I don't jest have all day to figger out the answer to everyone of your questions. Let me jest tell you, a body could sure 'nuff figger out some ways 'cause that's what them fellers in Washington say and that ol' Congress jest wouldn't let 'em say it if it wasn't so!"

"But did they ever run a airport, Unca Dick?"

"Now you're getting' downright impertinent! When you're back thar in Our Nation's Capital spendin' all that big money and makin' all them big decisions, you don't have to know how to run nothin'! The business of the federal guv-mint is writin' regulations. An' that's yer second lesson in civics".

"Well, Unca Dick, is that ol' 36-3 regulation any use to you the way it now stands?"

"Any use? Any use? Why you gotta be sure it's a whole lot o' use. See it's jest like the question of weights. You take a bad ol' airplane up thar at the top of the list makin' all kinds o' noise an' commotion, an' you take half the cargo outta it and it plum quiets down 'till it ain't no worse than them goody-goody-two-shoes airplanes thar towards the bottom of the lists. But them boys in Washington they know that the folks who live round this Airport, they ain't concerned with such as that. They don't care a dern fer how much noise that ol' airplane makes over their house. What they want to know is how much noise does it make on paper! So far as useful, that 36-3 is useful as mud to a hog. I guv a copy of it to all my employees an' ever time they's any noise round here they jest wave the bejesus out o' that paper an' that kills thet noise deader'n a louse."

"I got only one last question, Unca Dick. How come those two big Washington guys said that you was closely aligned with the ATA and United an' all that?"

"Well, Tommie, you got to unnerstan' conspiracies. See now when two folks both say the same thing bad about the same agency of our federal guv-mint, (Salute the flag, Son!) and 'specially when that bad thing said is that there was a ERROR er a OMISSIONS er

both in a regulation of that thar guv-mint, why thet's jest plain agin' the law! An' it's jest as plain as the nose on yer face that they done got together an' conspired to overthrow that guv-mint by force and violence!"

"Or logic?"

"By force, violence or logic! In Washington, they all count the same. An' that's yer third lesson in civics for today.

"Now you run along 'cause I got a office full of friends an' neighbors out there waitin' to see me. There's Anita and Sylvia and Tom and Art and Dave and Ellie and Don an' I don't jest know how many of their friends. I think they all come up here to thank me an' the FAA pro-fuse-ly fer solvin' their noise problem so easylike by puttin' that 36-3 in the hands of ever' dang airport employee. Yah! I'm purty sure that's what they're here for. Listen to 'em poundin' on that ol' door."

Sincerely,

Richard R. Heath
Director of Airports

P. S. I reckoned it would be good for all those folks who got your perspective to get Tommie's, even if he is just a precocious 11-year old know-it-all. So I sent copies to them an' to a few others.

cc: Ms Mary Schuman
Members, Airports Commission

Appendix U

AIRPORTS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO
DIANNE FEINSTEIN MAYOR

SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CALIFORNIA 94128
(415) 761-0800

MORRIS BERNSTEIN
PRESIDENT
WILLIAM K. COBLENTZ
VICE-PRESIDENT
RUTH S. KADISH
DR. Z. L. GOOSBY
J. EDWARD FLEISHELL

RICHARD R. HEATH
DIRECTOR OF AIRPORTS

November 23, 1979

Mr. Clark H. Onstad
Chief Counsel
Federal Aviation Administration
Washington, D. C. 20591

Dear Clark:

Now that you've had time to digest the fable of Nephew Tommie, let me be serious about the problems of 36-3. I am not opposed to using this methodology. However, I believe it has serious limitations and should only be considered for use until a better system is employed.

Our immediate problem with 36-3 was that in its initial state it is unusable. Our proposed policy based on 36-3 was to be an interim policy designed to take us only to the end of the Land Use Study. When the replies from the airlines came in and we learned of the errors and omissions that were admittedly going to be corrected in a later version, it became clear that the revision could not possibly be done in time to provide a solid basis for a noise policy to be implemented prior to the end of this year. Until 36-3 is error-free and all-inclusive, we can't even determine what effect any policy based on it would have.

Wesler's statement that we should have run something or other through some computer before we established a cut-off line is the purest poppycock. No computer could tell us a blessed thing we needed to know until we could tell the computer what operations would occur without such and such a cut-off line as compared to what operations would occur with such and such a cut-off line. The noise consultants doing the Land Use Study and Peat Marwick both agree. Perhaps someone should tell your people that residence in Washington does not confer omniscience. Technicians do reside elsewhere.

Without any true reading on what planes would, in fact, be eliminated by drawing a line at any level, no computer run would be worth a thing. We knew that before we even talked about 102. That's why we asked each airline to provide us the data on what operations would be eliminated at each decible level from 106 to 102. We had to have that to know what the adverse effects of a policy with a cut-off at each level would be. We could have pulled a fast one on the local people by drawing the line at 107, thus eliminating only the Concorde. We don't play that way. (Our friends and neighbors wouldn't let us even if we wanted to.) We could have kept the airline replies secret and drawn the line at 102, knowing that no airplane would be eliminated because of the errors you prefer to call "displaced notes." We don't play that game, either. So we withdrew from the 36-3 alternative temporarily.

The result is not fatal, since deregulation has not resulted in a great increase in flights. Fuel costs and allocations are, in fact, now cutting back operations slightly.

AC 36-3 when revised may provide us a mechanism for some short-term policies which will certainly be helpful. Differential pricing can be based on its standard test data. And time of day differentials can be added in. But 36-3 will never provide a sound basis for the research efforts we are committed to. For that, we need to move forward rapidly on developing an effective system of measuring actual noise produced by various actual aircraft in various weather conditions utilizing various runways and following various SAFE noise mitigation procedures. 36-3 can never provide the basis for such research.

We are working with the Metropolitan Transportation Commission on the possible implementation of a regional noise banking system. Such a system could be based on 36-3 and, as an interim measure, might have to be. But for real effectiveness, 36-3 must give way to a measuring system that records the actual noise produced in all neightborhoods by various operations. We have done enough research to know that such a system can be developed and can be totally automated with FAA cooperation. We are asking Langhorne Bond for that cooperation. We hope you will support that request. A copy of my letter to Langhorne is enclosed.

Sincerely,

Richard R. Heath
Director of Airports

enclosure
cc: Mr. Langhorne Bond
Ms Mary Schuman

Appendix V

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO
DIANNE FEINSTEIN, MAYOR

SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CALIFORNIA 94128
(415) 761-0800

MORRIS BERNSTEIN
PRESIDENT
WILLIAM K. COBLENTZ
VICE-PRESIDENT
RUTH S. KADISH
DR. Z. L. GOOSBY
J. EDWARD FLEISHELL

RICHARD R. HEATH
DIRECTOR OF AIRPORTS

November 23, 1979

Mr. Langhorne Bond
Administrator
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D. C. 20590

Dear Langhorne:

I hope you will recall that about two years ago Commissioner Ruth Kadish and I had a chat with you in your Washington office. We talked about many things, but one of the points we made was that we needed to develop a system at San Francisco that would permit us to tie our noise monitoring system to the FAA system in order to identify the actual aircraft engaged in the operation and producing the noise we are measuring. Such a system is needed as much for research purposes as for regulatory purposes.

We pointed out that San Francisco International has some problems that may be unique. Our location in a natural amphitheater increases the adverse effect of low frequency noise. We badly need the ability to determine the true mitigation effects of various flight procedures in order to lower noise levels sufficiently to avoid the imposition of operational restrictions that could have grave economic consequences. We think that economic incentives and disincentives can be utilized in a variety of ways that will be effective if we can accurately determine the noise produced by each operation. We are certain this can be done without lowering any safety standard.

Your response at that time was very positive and gave us cause for optimism. You later wrote to one of your officials telling him to cooperate with us and to keep us posted on the progress being

made at Boston as well as on the system then being installed at National and Dulles. We were to be invited to participate in the Boston study.

It is now my sad duty to report to you that we have received exactly nothing in the way of assistance from the FAA. While local officials have been highly cooperative on everything else, they lack the technical expertise and the authority to help on this.

As you know, our ANCLUC study is coming to its close. It was my hope, the hope of the Airports Commission, the hope of the Joint Powers Board, and the hope of our friends and neighbors that the requested system could be designed and installed by the time the land use study was completed. That hope is fast dying. The need has not diminished.

I know that many of your people, especially in Washington, have grave concerns about what such a system will do to operational safety. Obviously, if it were used to mandate unsafe procedures, the results could be catastrophic. But no responsible person supposes that that would be the case.

I have heard the argument used that if an individual operation is financially penalized because a safe but noisier procedure is followed by a pilot, the pilot may elect the less safe procedure and risk an accident. I don't know if that is official FAA policy, but whether it is or not, I would certainly argue that it is incorrect. It puts in question the basic professionalism of the pilot. I find it very hard to imagine any certified pilot for any certified carrier taking a chance with his aircraft with the lives of his passengers and with his own life in order to save his company a few bucks.

Does anyone really believe that it is inimical to safety for pilots to consider time and fuel efficiencies in their handling of their aircraft? Can anyone cite an example of a professional pilot deliberately choosing to cut two minutes off his flight time or deliberately choosing to save a few hundred gallons of fuel when in doing so he risks the safety of his plane and his passengers? Why is noise mitigation any different? Our goal is simply to have the pilot and the carriers crank into their thinking and planning considerations, thoughts as to how the operation can be completed safely but with minimum

noise impact on the surrounding communities. We want to develop a system with the research capabilities to make those mitigation plans most effective.

You and I both know that every pilot has a large number of things to consider in operating an aircraft. To say that adding noise considerations will overload the pilot's thinking apparatus is to falsely denigrate the human brain.

Obviously, the system we desire is possible of attainment. You have installed one version at your Washington airports. The reports are that the mere publication of data has had a positive effect.

Instead of assistance in this direction, we have been advised to use Advisory Circular 36-3. It will be of some value as a short-term device, but would never be worth a nickel for research purposes. It is of no value at all until the errors and omissions are corrected and variable values are assigned based on aircraft weight. Even then it will be subject to arguments within the industry as to its accuracy and fairness since it is not based on actual tests, but only on theoretic values.

Everyone who lives close to or works at a noisy airport knows that noise varies with weather conditions and with the flight procedures selected by the pilot. Sometimes a pilot has no choice. There is only one safe procedure. But where alternate safe procedures are available and one is quieter, why not construct a system that will encourage the pilot and the carrier to utilize the less noisy way to fly?

And how can we possibly work with pilots, carriers and our neighbors to find quieter alternatives if we do not have a way to measure the actual noise produced by actual operations?

No FAA official has said it is against the law to install such a system, but there is obviously some lack of enthusiasm in Washington in providing us any help in this effort.

The methods now utilized at the Washington airports and the one used in Boston are both relatively labor intensive. We will spend the money to develop and install a system here in San Francisco, with or without FAA assistance. But a much better automated system which would be cheaper and which would remove the human error factor could be developed if everyone were committed to do it and worked together to get it done.

I assume your commitment still stands. I hear that the Regional Office in Los Angeles may have the technicians required. If that be true, your giving the Regional Director authority to provide the assistance we request would be greatly appreciated.

For your edification and, perhaps, amusement, I enclose an exchange of correspondence between Clark Onstad and myself. Clark was a bit miffed at some of my remarks and I, of course, was absolutely delighted with his reply. Hence the fable of Nephew Tommie. Clark and I are still good friends, even if we don't always agree.

Sincerely,

Richard R. Heath
Director of Airports

enclosures

cc: Mr. Clark H. Onstad
Ms Mary Schuman

Appendix W

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C. 20591

DEC 13 1979

Mr. Richard R. Heath
Director of Airports
Airports Commission
San Francisco International Airport
San Francisco, California 94128

Dear Mr. Heath:

With respect to your letters dated November 23, 1979, I believe our prior communication concerning Advisory Circular 36-3 should remove your concern regarding the technical aspects of that document. We have not received any technically supported information indicating that the data in that document is incorrect. As I advised in my letter of November 7, there were some discrepancies in note material but these didn't affect the listed noise levels.

I fully appreciate the need for sound technical support for policy decisions. The FAA has cooperated with you in your efforts to establish a noise-monitoring system at San Francisco International Airport. The Chief of our Air Traffic Service ATC Automation Division met with Mr. Feener of your office and Mr. Thron, the technical consultant for the Massachusetts Port Authority (MASSPORT), at our National Aviation Facilities Experimental Center office in Atlantic City, New Jersey, about a year ago. The purpose of that meeting was to achieve a better understanding of what we were doing, as well as the MASSPORT progress.

At this time, I would like to apprise you of modified schedules of our planned installation activity. I am pleased to tell you that the necessary equipment will be installed in our Oakland TRACON site in February 1980. This means that we may be able to provide you with disk-recorded data by mid-March. The first system is being installed in Boston in early January and it is our understanding that MASSPORT anticipates initial use of the

DEC 13 '79

disk information by March 1980. An Air Traffic Service representative will contact Mr. Feener with more specific schedule information within the next 2 weeks.

Sincerely,

Clark H. Onstad
Chief Counsel

Appendix X

AIRPORTS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO
DIANNE FEINSTEIN, MAYOR

SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CALIFORNIA 94128
(415) 761-0800

MORRIS BERNSTEIN
PRESIDENT
WILLIAM K. COBLENTZ
VICE-PRESIDENT
RUTH S. KADISH
DR. Z. L. GOOSBY
J. EDWARD FLEISHELL

RICHARD R. HEATH
DIRECTOR OF AIRPORTS

January 9, 1980

Mr. Clark H. Onstad
Chief Counsel
Federal Aviation Administration
Department of Transportation
880 Independence Avenue, S.W.
Washington, D.C. 20591

Dear ~~Mr. Onstad~~ Clark:

Thank you for your advanced notification with respect to the installation of the disk-recorded data system at the Bay/TRACON. We have been in contact with Bob Kelm of FAA Western Region and with the Bay/TRACON and hope to experiment with data from the improved system by June or July 1980.

My concerns with respect to Advisory Circular 36-3 remain unchanged. From your previous letter I understand that a revised AC-36-3 will be published which will correct the discrepancies in note material, and that it will include a description of all aircraft operating in the airline fleet. When can we anticipate receiving this revision?

Yours truly,

Richard R. Heath
Director of Airports

Appendix Y

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 80-0080

WHEREAS, The Community of Outer Mission Organizations (COMO), other neighborhood groups representing citizens living in the southern half of San Francisco, and numerous individual residents of that area, have filed many complaints with this Airport concerning the noise impact caused by commercial jet aircraft flying at low altitudes over the residential neighborhoods in this geographic area; and

WHEREAS, Concern has been expressed for the safety of residents under such overflights; and

WHEREAS, The frequency and vehemence of such complaints has increased substantially over the past year; and

WHEREAS, Members of the San Francisco Board of Supervisors representing districts in the southern half of the City of San Francisco have expressed their growing concern over this situation; and

WHEREAS, Under federal laws and regulations, this Commission, as the proprietor of the San Francisco International Airport, has absolutely no power or authority over the flight paths utilized by aircraft in flight, regardless of the origin or destination of such aircraft; and

WHEREAS, The flight path of each commercial jet aircraft is determined by the procedures and regulations of the Federal Aviation Administration, by the pilot of the aircraft, and by the air carrier owning and/or operating such aircraft; and

WHEREAS, This Commission feels strongly that those agencies and individuals having the power and authority to control the flight paths of aircraft flying in the Bay Area air space should make every

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 80-0080

effort consistent with applicable safety standards to direct the flight of all commercial jet aircraft so as to avoid flying over the densely populated areas of the Bay Area and particularly the southern half of the City of San Francisco and, wherever feasible, the flight paths of such aircraft should be conducted over water and not over land; now, therefore, be it hereby

RESOLVED, That this Commission strongly urges the Federal Aviation Administration officials in charge of the Bay Area Traffic Control District (Bay Tracon), along with appropriate representatives of the commercial jet aircraft pilots and the scheduled jet air carriers operating into and out of the Bay Area to commence immediately a coordinated re-examination of relevant flight policies and practices to determine what changes can reasonably be made which will substantially reduce commercial jet flights over the southern half of the City of San Francisco and over other heavily populated land in the Bay Area and which will redirect, wherever possible, such flights over water; and be it further

RESOLVED, That this Commission urges the Federal Aviation Administration, the pilots and air carriers to take all appropriate actions to accomplish a significant reduction in such overflights as soon as possible; and be it further

RESOLVED, That this Commission further requests that the officials of Bay Tracon keep it informed, through the Director of Airports, of the progress beng made in accomplishing the actions recommended herein; and be it further

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 80-0080

RESOLVED, That the Director of Airports is hereby directed to make appropriate distribution of this resolution to all interested public officials and private citizens.

I hereby certify that the foregoing resolution was adopted by the Airports Commission at its meeting of APR 1 1980

Secretary

Appendix Z

GEORGE AGNOST
CITY ATTORNEY
CITY & COUNTY OF SAN FRANCISCO

AIRPORTS DIVISION
DONALD J. GARIBALDI
AIRPORTS GENERAL COUNSEL
DAVID I. KROOPNICK
ASS'T. AIRPORTS GENERAL COUNSEL
JAMES H. WOODS
CRISTINE E. GONDAS

P.O. BOX CENTRAL TERMINAL
SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CA 94128
(415)876-2102
WRITER'S DIRECT DIAL NUMBER:
(415) 876-2102

March 12, 1980

Michael M. Berger
Fadem, Berger and Norton
501 Santa Monica Blvd., Suite 600
P.O. Box 2148
Santa Monica, Ca. 90406

Re: City of Los Angeles v. Greater Westchester Homeowners Association

Dear Mike:

The City and County of San Francisco, by and through its Airports Commission, requests your written consent to its participation in the referenced matter by the filing of a brief amicus curiae in support of the City of Los Angeles' Petition for Writ of Certiorari to the United States Supreme Court.

I understand that you have no objection to this request, and I would appreciate it if you would indicate your consent in the space provided below, and if you would then return the original of this letter to us so that it may be presented to the Court.

Very truly yours,

David I. Kroopnick

DAVID I. KROOPNICK
Asst. Airports General Counsel

Consent is hereby given to participation by the City and County of San Francisco, by and through its Airports Commission, as amicus curiae before the Supreme Court of the United States in the case of City of Los Angeles v. Greater Westchester Homeowners Association.

Dated: 3/17/80

Michael M. Berger
Attorney for Respondents

GEORGE AGNOST
CITY ATTORNEY
CITY & COUNTY OF SAN FRANCISCO

AIRPORTS DIVISION
DONALD J. GARIBALDI
AIRPORTS GENERAL COUNSEL
DAVID I. KROOPNICK
ASS'T. AIRPORTS GENERAL COUNSEL
JAMES H. WOODS
CRISTINE E. GONDAK

March 12, 1980

SUITE CENTRAL TERMINAL
SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CA 94128
(415)876-2100
WRITER'S DIRECT DIAL NUMBER:
(415) 876-2102

Burt Pines
City Attorney
Airport Division
1 World Way
Los Angeles, California 90009

Attn: Lawrence M. Nagin
Senior Assistant City Attorney

Re: City of Los Angeles v. Greater Westchester Homeowners Association

Gentlemen:

The City and County of San Francisco, by and through its Airports Commission, requests your written consent to its participation in the referenced matter by filing of a brief amicus curiae in support of the City of Los Angeles' Petition for Writ of Certiorari to the United States Supreme Court.

I understand that you have no objection to this request, and I would appreciate it if you would indicate your consent in the space provided below, and if you would then return the original of this letter to us so that it may be presented to the Court.

Very truly yours,

DAVID I. KROOPNICK
Asst. Airports General Counsel

Consent is hereby given to participation by the City and County of San Francisco, by and through its Airports Commission, as amicus curiae before the Supreme Court of the United States in the case of City of Los Angeles v. Greater Westchester Homeowners Association.

Dated: 3-18-80

Burt Pines

By: Lawrence M. Nagin
Lawrence M. Nagin
Attorneys for Respondents

Supreme Court, U. S.
FILED
JUN 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-1406

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., et al.,
Respondents.

BRIEF OF AMICUS CURIAE OF CITY OF SAN JOSE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

ROBERT J. LOGAN
City Attorney
WILLIAM B. MAYFIELD
Senior Deputy City Attorney
151 W. Mission Street
San Jose, CA 95110
Attorneys for Amicus Curiae City of San Jose

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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No. 79-1406

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OCTOBER TERM, 1979

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., et al.,
Respondents.

BRIEF OF AMICUS CURIAE OF CITY OF SAN JOSE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The City of San Jose, a municipal corporation, respectfully submits its brief, *amicus curiae,* with the consent of the parties pursuant to United States Court Rule 42, in support of the position advanced by Petitioner City of Los Angeles. Copies of the letters of consent are filed herewith.

INTRODUCTION

The City of San Jose appears as amicus curiae in support of the Petition for Writ of Certiorari by the City of Los Angeles because it too is an airport proprietor vitally interested in the resolution of the questions posed in the petition.

The San Jose Municipal Airport has had to contend with a serious noise impact on surrounding communities as the price of providing air service to those same communities. Substantial sums have already been diverted from needed airport developments in order to buy properties affected by this noise impact, and even larger expenditures for further acquisition and sound-proofing will be necessary in the future. In attempting to resolve its noise impact problem, the City of San Jose can ill afford to also burden the courts and itself in averting countless and never-ending nuisance actions.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. Preliminary Statement

Your amicus, City of San Jose, adopts by reference the brief of Petitioner City of Los Angeles in the Petition for Writ of Certiorari.

2. The Extent of Federal Preemption Is in Doubt

Federal preemption of state and local noise regulations received a broad statement by the United States Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 683 (1973):

> "Control of noise is of course deep seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfew or other local controls."

Since then, however, a three-judge panel has distinguished *Burbank* and stated a scaled-down version of fed-

eral noise preemption: state or local noise controls which do not "intrude upon or affect flight operations and airspace management in commerce" are not preempted. *Air Transport Association of America v. Crotti* 389 F.Supp. 58, 64-65 (1975).

Greater Westchester presents the first opportunity since *Burbank* was rendered to consider the question of nationwide significance: is the federal scheme of aircraft noise control so pervasive that all state and local controls (except by airport proprietors themselves) are preempted? If not, is the dividing line of preemption in this field whether non-proprietory state and local regulations "intrude upon or affect flight operations and airspace management?"

This is the fundamental decision required before one can ask whether the state nuisance law at risk in *Greater Westchester* intrudes into the federal domain. For if the holding in *Burbank* is as broad as appears, there can be no question but that the state law here is preempted. If the preemption is narrower, a new analytic tool is needed for delineating the line over which state and local controls may not go. The advent of aggressive airport regulation by states such as California and the swelling of a new (and probably nationwide) wave of airport nuisance litigation requires a clear statement of the Court's meaning in *Burbank*. The case on petition offers a well-defined framework for giving guidance in this field of great importance to the nation's airports and to the states and municipalities who would seek to regulate their noise.

3. California's Nuisance Law Intrudes on the Federally-Preempted Field of Aircraft Flight

The parties to this case correctly stipulated that "While in flight, commercial jet aircraft are subject to the control of the United States Government, not the City," and "'Flight' as used herein, means from the time an aircraft leaves the gate until it returns to the gate." It was private aircraft operating under pervasive federal government control which created the harm for which recovery was awarded; there was absolutely no showing that the City engaged in any tortious conduct on its own property or in control of these aircraft in flight.

These are circumstances unique to airports served by Federal Aviation Administration air traffic control facilities, which form an integral part of the intertstate commerce air transportation system of this country. Recent Federal and State court decisions in California acknowledged that state or local assertion of the police power over such a system is fundamentally inconsistent with the scheme of intergovernmental relations developed for that system. *Burbank v. Lockheed Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547]; *Air Transportation Association of America v. Crotti* (N.D. Cal. 1975), 389 F.Supp. 58; *San Diego Unified Port District v. Superior Court* (Britt) (1977) 67 Cal.App.3d 361. State exercise of the judicial power, asserting state jurisdiction for tort actions created by state law, is likewise inconsistent with the fact of pervasive federal control over this interstate commerce system. It is respectfully submitted that the decision in

San Diego Unified Port District v. Superior Court (1977) 67 Cal.App.3d 361,[1] was correct in its observation that:

> ". . . civil damages for the noxious byproducts of aircraft in flight, like the Burbank ordinance and like the SENEL regulations invalidated in *Crotti,* are a form of state regulation in an area which must remain free of such regulation if national air safety, traffic and noise policy are to be left unhampered."

4. Airport Proprietors Have Legal Obligations for Noise Under the Constitution and Federal Law But Not Under Interfering State Law

The California Supreme Court apparently misunderstands the holding of the United States Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624 (1973). Yes, that case reserved room for the airport proprietor within the federal scheme of national aircraft noise regulation, which imposes legal obligations on the airport proprietors in return. This constrained proprietary power has been considered sufficient to impose upon airports inverse condemnation liability for aircraft noise. *Aaron v. City of Los Angeles,* 40 Cal.App.3d 471, 115 C.R. 162 (1974). Airport proprietors also have legal obligations under the federal scheme to exercise their limited powers in a reasonable and non-discriminatory fashion. *British Airways Bd. v. Port Authority of New York, etc.* (2d Cir. 1977) 564 F.2d 1002, 558 F.2d 75. The airport proprietors' legal obligations have thus been defined by the Constitution and federal noise control regulations.

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[1]City with approval but also apparently overruled by implication in the decision for which a Writ of Certiorari is herein petitioned.

What the California Supreme Court overlooked is that to say airport proprietors have legal obligations is *not* to say the have legal obligations to the *states*. The federal scheme has clearly precluded interfering state regulation (*Air Transportation Association of America v. Crotti* (N.D. Cal. 1975) 389 F.Supp. 58) and the imposition of tort damages by states over a federally-owned field of activity is a serious form of interference. *San Diego Building Trade Council v. Garmon,* 359 U.S. 236 (1959); *Luedtke v. County of Milwaukee* (7th Cir. 1975) 521 F. 2d 387.

5. California's Nuisance Law Affects Interstate Air Commerce

If the decisions below are upheld a host of nuisance actions may be spawned against the California airports. San Jose, like most other California airports, is already experiencing this expected new wave of nuisance litigation. Despite the fact that these public airports may have already acquired avigation easements over surrounding properties by purchase or as a result of inverse condemnation actions, there would remain the prospect of innumerable and repetitive nuisance actions for damages (and perhaps the more serious threat of injunctive relief) from the owners and occupiers of these same properties. The only effective resolution would then be to acquire these properties entirely and relocate their residents.

In *Griggs v. Allegheny County* 369 U.S. 84 (1962) 7 L. Ed.2d 585, 82 S.Ct. 531) the line of inverse condemnation cases against airports for noise was begun with the observation that:

> "Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough."

Allowance of a new line of state law nuisance cases for airport noise is tantamount to saying: "By state tort law standards, the airport did not acquire enough."

This resolution of the problem, however, would impose not only a serious financial burden on the public airports of states following the lead of California but, more particularly, would create unacceptable political reactions in the communities faced with a major new eminent domain program launched against its citizens. In view of the protection afforded by constitutional standards, as well as the unwarranted intrusion into interstate air transportation that additional nuisance actions must portend, the permission of a state law cause of action in nuisance for airport noise is respectfully urged to be neither necessary nor desirable.

Dated: June 11, 1980.

ROBERT J. LOGAN
City Attorney

WILLIAM B. MAYFIELD
Senior Deputy City Attorney
Attorneys for Amicus
Curiae City of San Jose

Supreme Court, U.S.
FILED
JUL 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1406

In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,
PETITIONER

v.

GREATER WESTCHESTER HOMEOWNERS
ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1406

CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, PETITIONER

v.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation of May 12, 1980.

STATEMENT

Petitioner City of Los Angeles, a California municipal corporation, owns and operates Los Angeles International Airport. In 1968, respondents, who own or occupy homes near the airport's two north runways, brought this action against the City for damages arising out of its operation of the airport (Pet. App. 4). Respondents sought compensation for alleged takings of their property by inverse condemnation and, on a nuisance theory, for personal injuries allegedly caused by the noise, smoke and

vibrations attributable to aircraft using the airport's two north runways (*ibid.*). Respondents' action was consolidated with certain condemnation actions that the City had brought to condemn other nearby properties (*ibid.*). The condemnation and nuisance claims were bifurcated, and the direct and inverse condemnation claims resulted in substantial awards that have been fully satisfied (*ibid.*).

After the subsequent trial of respondents' nuisance claims, the court found that the noise created by jet aircraft using the airport's two north runways created an actionable nuisance, giving rise to damages for "annoyance, inconvenience, discomfort, mental distress, and emotional distress" (Pet. App. 4-5), and that respondents' claim for personal injuries was independent of their claim for damages to their properties (*id.* at 5). Accordingly, some 41 plaintiffs were awarded nuisance damages in the aggregate sum of $86,000 for personal injuries inflicted from 1967, the completion date of the airport's north runways, to September 30, 1975, the date of final judgment (*ibid.*). The California Court of Appeal affirmed the judgment entered by the trial court on the principal issue of nuisance liability (Pet. App. 30).

On appeal to the California Supreme Court, the City attacked the judgment on two grounds. First, the City asserted that it could not be liable for such damages because the tortious activities originated from in-flight aircraft over which the federal government is said to exercise exclusive control. The City further contended that the federal government had preempted any attempt by airport operators to control or reduce such noise. Second, the City argued that it was immune from nuisance liability because operation of the airport was expressly permitted by state statute. The California

Supreme Court found neither argument persuasive and unanimously affirmed the award against the City.[1]

In its opinion, the California Supreme Court examined this Court's decisions in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), and *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 (1973), as well as the Federal Aviation Administration's interpretations of those decisions. The court found that the federal government's substantial involvement in air navigation and aircraft noise control has been carefully limited to preserve the ability of airport proprietors to limit their liability for damages by employing reasonable, nondiscriminatory measures to reduce aircraft noise. The court found "significance in the depth and continuous nature of [the] City's involvement in the creation and maintenance of the nuisance in question" (Pet. App. 14). The court noted that the City had conceded that it was responsible for deciding where and how to operate the airport, and that the City had acknowledged its power to acquire aircraft noise easements from affected landowners through condemnation proceedings. Moreover, the court found nothing in the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.*, that would either give relief to airport noise victims or empower the federal government to adjudicate disputes between such victims and airport proprietors. Finally, the court found unpersuasive the City's assertion that imposition of nuisance liability for personal injuries

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[1]The City successfully challenged the trial court's award of prejudgment interest on both the condemnation and nuisance awards (Pet. App. 20-22). The City also challenged an award of attorneys' fees, which was vacated and remanded to the trial court (*id.* at 22-23).

would hinder commerce or interfere with federal policy. The court noted that similar liability has long existed with respect to the taking of property.[2]

The court also found no merit in the City's contention that the California legislature had granted immunity from nuisance liability by authorizing operation of the airport. The court stated that "although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance" (Pet. App. 18; emphasis in original).

ARGUMENT

In our view, the decision below is plainly correct, does not create a significant conflict with other decisions and is not of sufficient importance to warrant review by this Court.

1. The noise associated with the operation of jet aircraft has generated a substantial body of federal law on the question of federal preemption of aircraft noise control.[3] All of these decisions recognize the preeminent

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[2]Chief Justice Bird concurred separately in the unanimous judgment. She carefully reviewed the relevant congressional and administrative materials and concluded that, "While federal regulation is extensive, both the legislative and executive branches have publicly emphasized local airport operators' responsibility for controlling airport noise through reasonable nondiscriminatory regulation" (Pet. App. 25).

[3]In addition to *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 (1973), see *Allegheny Airlines* v. *Village of Cedarhurst*, 238 F. 2d 812 (2d Cir. 1956); *American Airlines, Inc.* v. *Town of Hempstead*, 272 F. Supp. 226 (E.D. N.Y. 1967), aff'd. 398 F. 2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); *Luedtke* v. *County of Milwaukee*, 521 F. 2d 387 (7th Cir. 1975); *British Airways Bd.* v. *Port Authority of New York*, 558 F. 2d 75 (2d Cir. 1977); *British Airways* v. *Port Authority of New York*, 564 F. 2d 1002 (2d Cir. 1977); *City of Dallas* v. *Southwest Airlines Co.*, 494 F. 2d 773 (5th Cir.), cert. denied, 419 U.S. 1079 (1974); *Air Transport Ass'n* v.

and exclusive authority of the federal government to regulate the flight of aircraft in the navigable airspace of the United States for the benefit of the public. But, since this Court's decision in *Burbank*, *supra*, a number of courts have concluded that the power of the federal government to regulate aircraft noise is not total, and that the Congress has carefully reserved a vital role for the airport proprietor.

In *British Airways Bd.* v. *Port Authority of New York*, 558 F. 2d 75 (2d Cir. 1977) (Kaufman, C.J.), the Second Circuit cogently explained the limited preemption principle that applies in the field of aircraft noise control. There, the operators of the Concorde supersonic transport sued the proprietor of John F. Kennedy Airport to overturn an airport ban that prevented the Concorde from serving New York in a 16-month demonstration experiment that the Secretary of Transportation had authorized. The district court found that the federal government had preempted the proprietor from banning the aircraft through its authorization of the demonstration flights. The Second Circuit reversed, holding that Congress had "provided for the promulgation by airport proprietors of reasonable regulations to establish acceptable noise levels for the airfield and its environs." *British Airways Bd.*, *supra*, 558 F. 2d at 78. To our knowledge, no federal court has repudiated or disagreed with this holding.[4]

Crotti, 389 F. Supp. 58 (N.D. Cal. 1975); *Nat'l Aviation* v. *City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976); *San Diego Unified Port District* v. *Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978), 9th Cir., No. 78-3260 (9th Cir.), awaiting decision.

[4]In *Luedtke* v. *County of Milwaukee*, 521 F. 2d 387 (1975), the Seventh Circuit had previously rejected plaintiffs' contention that the General Mitchell Airport constituted a nuisance because of the manner in which it was operated. After a truncated analysis of the

2. In *British Airways Bd.*, the Second Circuit placed significant emphasis upon the *amicus curiae* submission by the United States. The court stated (558 F. 2d at 84):

> The FAA after thorough study has wholeheartedly endorsed a continued major role for airport proprietors in the development of noise abatement programs consonant with local conditions. See Dep't of Transportation, Aviation Noise Abatement Policy (Nov. 18, 1976). And, we interpret the Government's *amicus* brief in the case before us to be premised on the view that Congress has, by giving explicit sanction to this pattern of regulations, implicitly denied the executive the power to preempt operator-imposed noise restrictions regardless of the statutory source invoked to support federal administrative action.

---

issue, the Seventh Circuit held that because "federal laws and regulations have preempted local control of aircraft flights," compliance with those laws and regulations is a full defense to a charge of nuisance. *Luedtke*, *supra*, 521 F. 2d at 391. While the Seventh Circuit cited this Court's decision in *Burbank* in support of its holding, that court did not carefully examine *Burbank* (see 411 U.S. at 635-636 n.14), and did not attempt to reconcile its disposition of the nuisance claim with its holding that under *Griggs*, *supra*, the landowners had a valid cause of action for inverse condemnation against the airport proprietor. *Luedtke*, *supra*, 521 F. 2d at 391. The federal noise policy that was recognized in *Burbank*, *supra*, 411 U.S. at 635-636 n.14, does not allow for "local control of aircraft flights" and, to that extent, the Seventh Circuit was correct. However, that court failed to recognize the broad arsenal of powers otherwise available to proprietors, which have been purposefully reserved to them because of their special ability to deal with local problems, and the court failed to recognize that the misuse or failure to use such powers could result in tort liability. In any event, the Seventh Circuit's decision has not been followed by other federal courts and does not represent a clear or significant conflict with the opinion below.

The executive branch's consistent interpretation is found not only in the Aviation Noise Abatement Policy to which the Second Circuit referred, but also in the regulations establishing maximum noise levels for aircraft engines. 14 C.F.R. Part. 36.5 provides:

> Pursuant to 49 U.S.C. 1431(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. *No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport.* [Emphasis added.]

Thus, the executive branch as well as the federal courts have clearly recognized that federal law and policy respect the power of airport proprietors to take numerous steps to reduce aircraft noise in the airport environment.

3. In recent years, the Congress has taken a number of steps to assist airport proprietors in reducing airport noise. Since 1970, the Airport and Airway Development Act, 49 U.S.C. 1701 *et seq.*, has provided federal funding for airport development, including "any acquisition of land or of any interest therein necessary to insure that such land is used only for purposes which are compatible with the noise levels of the operation of a public airport." 49 U.S.C. 1711(3)(C). In the Airline Deregulation Act of 1978, Congress specifically preserved "the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the [Civil Aeronautics] Board to exercise its proprietary powers and rights." 49 U.S.C. (Supp. II) 1304(b)(1). Finally, in the Aviation Safety and

Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50, 49 U.S.C. 2101 *et seq.*, a new mechanism was created whereby airport proprietors who have submitted an aircraft noise reduction plan to the Secretary of Transportation may also adopt a number of measures to reduce airport noise, including the implementation of a preferential runway system, use restriction by type or class of aircraft, construction of acoustical noise barriers and, to the extent approved by the Administrator of the FAA, "the use of flight procedures to control the operation of aircraft to reduce exposure of individuals to noise in the area surrounding the airport." 49 U.S.C. 2104. Surely, these explicit statutory measures, which were intended to assist and encourage airport proprietors in their noise control efforts, demonstrate that there is no merit to the City's assertion that it is unable to control airport noise effectively because of total federal preemption.

4. In sum, the California Supreme Court correctly ascertained the present state of federal preemption in the field of aircraft noise control. The City mistakenly attributes to *Burbank* a significance that this Court disclaimed when it stated, "We do not consider here what limits, if any, apply to a municipality as a proprietor." *Burbank*, *supra*, 411 U.S. at 635-636 n.14. Alternatively, the City attempts to fashion a new standard of total preemption in this area by "merging" certain aspects of the Court's opinion in *Burbank* with the Seventh Circuit's incomplete analysis in *Luedtke*, *supra*, and with the Court's holding in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). That effort must fail, because the exclusive federal jurisdiction established by the National Labor Relations Act and reiterated in *Garmon* is substantially different in scope from the limited and carefully confined federal powers in the aircraft noise control area.

Nor is it relevant that, here, the City has been held liable in tort for personal injury, whereas the more frequent claim involves a taking of property by inverse condemnation.[5] The noises of jet aircraft landing and taking off from airports which cause personal injuries are the same noises that simultaneously cause takings of property. In both cases, such noise is the responsibility of airport proprietors who have built the airport, located the runways and maintain sole responsibility for the operational decisions at those facilities. Under this Court's ruling in *Griggs* v. *Allegheny County*, *supra*, the City of Los Angeles is liable for torts as well as for takings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

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[5]It should be noted that the City's present claim of total federal preemption was previously rejected when the City sought to avoid liability for inverse condemnation. See *Aaron* v. *City of Los Angeles*, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), cert. denied, 419 U.S. 1122 (1975).